

EXHIBIT 24

Michael Berkow
2/25/2013

1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case No. 11-cv-03071 (SRN/JJK)

Larry E. Smith, as trustee for
the Heirs and Next of Kin of
David Cornelius Smith,

Plaintiff,

vs.

Timothy Gorman and Timothy Callahan,
acting in their individual capacities
as Minneapolis police officers, and
The City of Minneapolis,

Defendants.

VIDEOTAPED DEPOSITION TRANSCRIPT OF

MICHAEL BERKOW

February 25, 2013

at

COPY

Gaskins Bennett Birrell Schupp, LLP
333 South Seventh Street
Suite 2900
Minneapolis, MN 55402

Reporter: Jane T. Doby
Registered Merit Reporter
Doby Professional Reporting, Inc.
DobyReporting.com
952.943.1587

Michael Berkow
2/25/2013

| | |
|--|--|
| <p>2</p> <p>1 APPEARANCES: 2 On Behalf of the Plaintiff: 3 Robert Bennett, Attorney at Law rbennett@gaskinsbennett.com 4 Jeffrey S. Storms, Attorney at Law jstorms@gaskinsbennett.com 5 Kathryn Bennett, Attorney at Law kbennett@gaskinsbennett.com 6 GASKINS BENNETT BIRRELL SCHUPP, LLP 7 333 South Seventh Street Suite 2900 Minneapolis, MN 55402 8 9 On Behalf of the Defendants: 10 Burt T. Osborne, Assistant City Attorney burt.osborne@ci.minneapolis.mn.us 11 CITY OF MINNEAPOLIS-OFFICE OF CITY ATTORNEY 350 South Fifth Street City Hall, Room 210 Minneapolis, MN 55415 12 Videographer: Jayme Hogan, Envision Video 13 14 15 NOTE: Pursuant to Minnesota Rule of Civil Procedure 30.06, the original transcript will be 16 delivered to Gaskins Bennett Birrell Schupp, LLP, the noticing party. 17 18 NOTE: Exhibit Nos. 1 through 6 were marked 19 for identification. 20 21 22 23 24 25</p> | <p>4</p> <p>1 (Oath administered.) 2 THE WITNESS: I do. 3 EXAMINATION 4 BY MR. BENNETT: 5 Q Would you state your full name for the 6 record, spelling your last, please. 7 A Michael Berkow. B-E-R-K-O-W. 8 Q And how old are you, sir? 9 A I'm 57. 10 Q I'm showing you what has been marked -- we've 11 marked three exhibits so far for the deposition. The 12 first is your 22-page report dated March -- or excuse 13 me, December 12 -- excuse me, December 17th, 2012 for 14 this matter. Correct? 15 A Yes, sir. 16 Q Exhibit 2 is Attachment A to that report, and 17 Exhibit B -- or 3 is Attachment B to the report. 18 Correct? 19 A Yes, sir. 20 Q All right. 21 And those -- you prepared the Exhibit 1 on 22 behalf of the City of Minneapolis at the behest of the 23 City Attorney's Office; is that right? 24 A Yes, sir, I did. 25 Q The...</p> |
| <p>3</p> <p>1 PROCEEDINGS 2 (The videotaped deposition of MICHAEL BERKOW 3 was commenced at 9:02 a.m. as follows:) 4 (Exhibits 1 through 3 were marked for 5 identification.) 6 MICHAEL BERKOW, 7 called as a witness, being first duly sworn, was 8 examined and testified as follows: 9 *** 10 VIDEOGRAPHER: This is the video deposition 11 of Michael Berkow. The date is February 25th, 2013, 12 and the time is approximately 9:02 a.m. 13 Would each attorney please state his or her 14 name for the record. 15 MR. BENNETT: Robert Bennett, appearing on 16 behalf of the plaintiff. 17 MR. STORMS: Jeff Storms, also on behalf of 18 the plaintiff. 19 MS. BENNETT: Kathryn Bennett for the 20 plaintiffs. 21 MR. OSBORNE: Burt Osborne for the 22 defendants. 23 VIDEOGRAPHER: Thank you. 24 Would the court reporter please administer 25 the oath.</p> | <p>5</p> <p>1 MR. BENNETT: I'm going to have to staple 2 these. Do we have a stapler? Somewhere in there? 3 THE WITNESS: There's a paperclip right 4 there. 5 MR. BENNETT: I'm going to paperclip it. 6 We'll staple it later. 7 BY MR. BENNETT: 8 Q Attachment A is you list your publications, a 9 list of cases which you testified as an expert by trial 10 or deposition in the past four yours and your fee 11 schedule; is that correct? 12 A Yes, sir. 13 Q Do you know how much you have been paid in 14 this case to date? 15 A I believe it's approximately \$16,000. 16 Q Okay. And that doesn't include the charges 17 to come out here and testify today? 18 A No, sir. 19 Q Okay. So that would be in addition to the 20 16,000? 21 A Yes, sir. 22 Q I'd like to go through Attachment B, which is 23 Exhibit 3. That's your CV; is that correct? 24 Curriculum vitae? 25 A It's a version of it, yes, sir.</p> |

2 (Pages 2 to 5)

Michael Berkow

2/25/2013

| | |
|---|---|
| <p>6</p> <p>1 Q And by "a version," what do you mean?</p> <p>2 A Well --</p> <p>3 Q Do you have -- do you have other versions?</p> <p>4 A Sure.</p> <p>5 Q This is the one you prepared for purposes of</p> <p>6 this report?</p> <p>7 A Yes, that's correct.</p> <p>8 Q Is it true and accurate?</p> <p>9 A Yes, sir.</p> <p>10 Q Okay.</p> <p>11 Where did you grow up?</p> <p>12 A I lived in a lot of places. I was born in</p> <p>13 Texas.</p> <p>14 Q I see you ultimately went to -- you got your</p> <p>15 B.A., bachelor of arts, from Kalamazoo College?</p> <p>16 A Yes.</p> <p>17 Q Is that in Kalamazoo, Michigan?</p> <p>18 A Yes.</p> <p>19 Q So you were not a Michigan native or --</p> <p>20 A Oh, no, sir.</p> <p>21 Q Okay.</p> <p>22 Then you -- you got that in 1978. What --</p> <p>23 what year did you graduate from high school?</p> <p>24 A 1973.</p> <p>25 Q And did you spend all of your baccalaureate</p> | <p>8</p> <p>1 police officer before then?</p> <p>2 A Before November 1st, 1976?</p> <p>3 Q Correct.</p> <p>4 A Yeah, no, sir.</p> <p>5 Q You were just -- were you in a cadet program</p> <p>6 or -- I mean, did -- your...</p> <p>7 How did you become a police officer with the</p> <p>8 Rochester Police Department?</p> <p>9 A In New York state it's a civil service test.</p> <p>10 So I took a civil service test, was placed on a list</p> <p>11 and was ultimately notified that I was accepted for</p> <p>12 employment.</p> <p>13 Q And where did you take your police skills</p> <p>14 training?</p> <p>15 A It -- my basic police academy?</p> <p>16 Q Yes.</p> <p>17 A At the Monroe County Regional Criminal</p> <p>18 Justice Training Center.</p> <p>19 Q In New York?</p> <p>20 A Yes, sir.</p> <p>21 Q And you did that prior to November of '76 or</p> <p>22 after?</p> <p>23 A After.</p> <p>24 Q Okay.</p> <p>25 But you're actually -- while you're at the</p> |
| <p>7</p> <p>1 time at Kalamazoo College?</p> <p>2 A No, sir.</p> <p>3 Q Where did you -- where else did you go to</p> <p>4 college?</p> <p>5 A University of Rochester.</p> <p>6 Q What years did you attend there?</p> <p>7 A It would have been 1978, part of 1978.</p> <p>8 Portion.</p> <p>9 Q When did you start Kalamazoo College?</p> <p>10 A I started Kalamazoo in September of 1973.</p> <p>11 Q And how long did you attend Kalamazoo College</p> <p>12 consecutively?</p> <p>13 A I attended until the fall of 1976.</p> <p>14 Q By then what were you in terms of credits?</p> <p>15 Were you a junior at that time, or a sophomore?</p> <p>16 A Senior, sir.</p> <p>17 Q You had not yet graduated, though?</p> <p>18 A No, sir.</p> <p>19 Q So you left Kalamazoo College to go back to</p> <p>20 Rochester?</p> <p>21 A Yes, sir.</p> <p>22 Q And you were appointed a peace officer in</p> <p>23 November 1 of '76, correct?</p> <p>24 A Yes, sir.</p> <p>25 Q Did you have any training in -- to become a</p> | <p>9</p> <p>1 academy or the training academy, you are a police</p> <p>2 officer; is that right?</p> <p>3 A Yes, sir. Yes, sir.</p> <p>4 Q And you were a police officer for the</p> <p>5 Rochester, New York Police Department from November of</p> <p>6 '76 until March of '82?</p> <p>7 A Yes, sir.</p> <p>8 Q You can look at Exhibit 3, if you'd like.</p> <p>9 A Oh, I'm sorry. I'm trying to -- I'm looking</p> <p>10 over your shoulder.</p> <p>11 Q Yeah, you can --</p> <p>12 A Excuse me.</p> <p>13 Q Whatever you want. That's fine, too. But</p> <p>14 that's why I gave it to you.</p> <p>15 A You're just on a different page. I don't --</p> <p>16 I think you might not have given me a complete</p> <p>17 attachment. Or did you? Are you starting down here?</p> <p>18 I'm sorry. Okay. Go ahead.</p> <p>19 Q I'm trying to follow it chronologically.</p> <p>20 A Yes, sir.</p> <p>21 Q Your education and your work history kind of</p> <p>22 intertwine; is that --</p> <p>23 A Yeah, I would say that is correct, yes, sir.</p> <p>24 Q Okay. So you were -- you were a police</p> <p>25 officer. And what was your rank from '76 until '82?</p> |

3 (Pages 6 to 9)

Michael Berkow

2/25/2013

| | |
|--|---|
| <p style="text-align: right;">10</p> <p>1 A Police officer.</p> <p>2 Q All right.</p> <p>3 A Would have had different assignments, but my</p> <p>4 rank was police officer.</p> <p>5 Q Okay. You hadn't become a sergeant or --</p> <p>6 A No, sir.</p> <p>7 Q So then you decide some -- in the middle of</p> <p>8 being this police officer stint at the -- at Rochester</p> <p>9 Police Department you're going to finish your</p> <p>10 baccalaureate degree; is that right?</p> <p>11 A Yes, sir.</p> <p>12 Q And you do that at the University of</p> <p>13 Rochester but get a diploma from Kalamazoo College?</p> <p>14 A Correct.</p> <p>15 Q All right. And you do that in 1978</p> <p>16 ultimately, correct?</p> <p>17 A Yes, sir.</p> <p>18 Q When in '78?</p> <p>19 A When did I get my diploma?</p> <p>20 Q Yeah.</p> <p>21 A I believe it was May or June.</p> <p>22 Q Okay.</p> <p>23 A I'm not a hundred percent certain.</p> <p>24 Q Were you full-time on campus at the</p> <p>25 University of Rochester?</p> | <p style="text-align: right;">12</p> <p>1 ninety -- '81? From law school?</p> <p>2 A I believe it's May of '81, yes, sir.</p> <p>3 Q And you remain a police officer in Rochester</p> <p>4 with a law degree until March of 1982; is that right?</p> <p>5 A Yes, sir.</p> <p>6 Q Then you're -- you say you were appointed as</p> <p>7 a confidential law clerk. Now, I don't know what that</p> <p>8 is. To the Honorable Michael A. Telesca. Is that</p> <p>9 how -- did I say that right?</p> <p>10 A Telesca.</p> <p>11 Q Telesca. From March of '82 to March of '83.</p> <p>12 So a one-year clerkship?</p> <p>13 A Yes, sir.</p> <p>14 Q What is a confidential law clerk? I don't</p> <p>15 know.</p> <p>16 A That was the title that they called it at the</p> <p>17 time that I went to work for him. I was a law clerk to</p> <p>18 a federal judge.</p> <p>19 Q Okay. Okay. So how many law clerks did that</p> <p>20 federal judge have?</p> <p>21 A Two.</p> <p>22 Q Okay. And Judge Telesca was an Article III</p> <p>23 United States District Court judge, correct?</p> <p>24 A Yes, sir.</p> <p>25 Q And you did that for one year?</p> |
| <p style="text-align: right;">11</p> <p>1 A No, sir.</p> <p>2 Q So it was part-time? Was it at night or...</p> <p>3 A Actually, during the day.</p> <p>4 Q Okay. I suppose you could work the night</p> <p>5 shift and go to school during the day if you're a</p> <p>6 police officer, correct?</p> <p>7 A Yes, sir.</p> <p>8 Q All right.</p> <p>9 Then you decide while you're a police officer</p> <p>10 to attend the Syracuse University College of Law; is</p> <p>11 that right?</p> <p>12 A Yes, sir.</p> <p>13 Q Do you do that on a full-time basis?</p> <p>14 A Yes, sir.</p> <p>15 Q And is that a day program or a night program?</p> <p>16 A To my knowledge, at that time they only had a</p> <p>17 day program.</p> <p>18 Q Okay. How long did it take you to go through</p> <p>19 law school?</p> <p>20 A Three years.</p> <p>21 Q And you took the New York bar?</p> <p>22 A Yes, sir.</p> <p>23 Q And passed?</p> <p>24 A Yes, sir.</p> <p>25 Q Then you graduated when? In like June of</p> | <p style="text-align: right;">13</p> <p>1 A Approximately one year, yes, sir.</p> <p>2 Q Then what did you do?</p> <p>3 A I then accepted a position as a litigation</p> <p>4 associate, as an associate at a law firm.</p> <p>5 Q And where was the law firm located?</p> <p>6 A Seattle, Washington.</p> <p>7 Q And how big a firm was that at the time?</p> <p>8 A I believe it was about, as -- best of my</p> <p>9 recollection, it was about 75 lawyers at that time.</p> <p>10 The name has changed and it's obviously a much larger</p> <p>11 firm today.</p> <p>12 Q What's the name of it today?</p> <p>13 A Last time I checked, it was Davis Wright</p> <p>14 Tremaine.</p> <p>15 Q Okay. And you were there on the order of</p> <p>16 eight months or so; is that right?</p> <p>17 A Approximately, yes, sir.</p> <p>18 Q March of '83 to November of '83?</p> <p>19 A Approximately, yes, sir.</p> <p>20 Q Did you take and pass the Washington state</p> <p>21 bar?</p> <p>22 A I did.</p> <p>23 Q And why did you decide to leave?</p> <p>24 A I decided I liked being a police officer</p> <p>25 better than I liked being a lawyer.</p> |

4 (Pages 10 to 13)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p>14</p> <p>1 Q The -- so you get reinstated to the Rochester 2 Police Department in November of '83 and serve as a 3 police officer there for ten years until September of 4 1993, correct? 5 A Yes. Yes, sir, that is correct. 6 Q Promoted to sergeant in '86 and lieutenant in 7 1990, correct? 8 A Yes, sir, that is correct. 9 Q In 1984 you went to the FBI National Law 10 Institute; is that right? 11 A Yes, sir. 12 Q How long was that program? 13 A I -- I don't recall exactly how long it was. 14 It was -- whether it was a week or two weeks. I don't 15 recall. 16 Q It's not a long program, though, right? 17 A No. Well, I don't know what you mean by 18 "long." 19 Q Like a semester of college -- 20 A No, sir. 21 Q Or -- 22 A No, sir. 23 Q -- law school? 24 A No, sir. 25 Q Okay.</p> | <p>16</p> <p>1 Baltimore, Maryland. Right? 2 A Yes, that would be correct. 3 Q How did you pull that off? How long is that 4 master's program? Was it an executive program or a 5 regular, at least year or two-year master's program? 6 A It's a two years master's program, but it's 7 in executive format. So it's two full days every other 8 week. 9 Q So you have to fly across country and go to 10 school? 11 A Yes, sir. 12 Q Okay. 13 You say that you were -- that you went to the 14 United States Department of Justice International Crime 15 Investigative Training Assistance Program. When was 16 that? 17 A That was in August/September timeframe of 18 1993. 19 Q Was that a job or was that -- were you on 20 loan from a police department? I'm trying to just 21 figure that out. 22 A It started as a detail where I was detailed 23 from the police department to the Department of 24 Justice. 25 Q Okay.</p> |
| <p>15</p> <p>1 A No, sir. 2 Q How about the FBI National Academy, 173rd 3 Session, that's -- how long is that program? 4 A That's a -- I believe that is ten weeks. 5 Q All right. 6 Southwest Command College, how long is that 7 program? 8 A You know, I don't recall. I want to say it 9 was either two or three weeks. It's a 10 several-week-long program. 11 Q And then ultimately you got a master's in 12 science -- Master of Science in Leadership and 13 Management in May of 2000. Correct? From Johns 14 Hopkins? 15 A Yes, sir. 16 Q Was that -- were you an on-campus student at 17 Johns Hopkins University? 18 A Yes, sir. 19 Q And where is that located? 20 A Baltimore, Maryland. 21 Q Was that at the same time that you were chief 22 of police at the South Pasadena Police Department? 23 A Yes, sir. 24 Q They're a ways away from each other, aren't 25 they? Pasadena, California and -- what's it --</p> | <p>17</p> <p>1 A And then became a full-time position. I 2 mean, it was full-time all the time, but it became a -- 3 an actual U.S. Department of Justice employee. 4 Q Okay. And when was that, that you were an 5 actual Department of Justice employee? 6 A Sometime during that same timeframe. I 7 couldn't tell you exactly when. 8 Q Then you leave to -- that to go become chief 9 of police in -- is it Coachella? 10 A That would be Coachella, California, yes, 11 sir. 12 Q And you're there from April of '95 to July of 13 '97? Is that right? 14 A Yes, sir. 15 Q South Pasadena Police Department from July of 16 '97 to August of 2001; is that right? 17 A That is correct, yes, sir. 18 Q Chief of police of Irvine Police Department 19 at August 2001 to April 2003? 20 A Yes, sir. 21 Q And then deputy chief of police at LAPD from 22 April 2003 to November of 2006? 23 A Yes, sir. 24 Q Any of those -- did you leave all of those 25 positions voluntarily?</p> |

5 (Pages 14 to 17)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p>18</p> <p>1 A Yes, sir.</p> <p>2 Q And as to L.A., you were not -- you were not</p> <p>3 terminated, correct?</p> <p>4 A Absolutely not.</p> <p>5 Q Were -- was it suggested that you resign from</p> <p>6 L.A.?</p> <p>7 A The opposite.</p> <p>8 Q They wanted to keep you?</p> <p>9 A Yes, sir.</p> <p>10 Q Okay. But you decided to go to Savannah-</p> <p>11 Chatham Metro Police Department in Savannah, Georgia;</p> <p>12 is that right?</p> <p>13 A Yes, sir.</p> <p>14 Q You leave them in November of 2009 and go</p> <p>15 to -- was it Kroll at the time or was it --</p> <p>16 A It was Altegrity at the time.</p> <p>17 Q Okay. And then Kroll buys Altegrity,</p> <p>18 ultimately?</p> <p>19 A No. Altegrity bought Kroll.</p> <p>20 Q Okay.</p> <p>21 A Yes. This is a little confusing at this --</p> <p>22 this one.</p> <p>23 Q And you're there for two and a half years?</p> <p>24 A Started in November -- I guess I -- yes.</p> <p>25 Q And then you leave to go to Strategic Policy</p> | <p>20</p> <p>1 for and in charge of all of the criminal investigators</p> <p>2 in the United States Coast Guard worldwide. So it's</p> <p>3 similar to being a criminal investigative division</p> <p>4 command, would be the analogy I would use for a police</p> <p>5 department.</p> <p>6 Q How many investigators are worldwide in the</p> <p>7 Coast Guard?</p> <p>8 A Just under 400. Somewhere in the --</p> <p>9 depending on if you count reserves and full-time.</p> <p>10 Q Okay.</p> <p>11 Are you presently a member of the -- good</p> <p>12 standing of any bar association of any state?</p> <p>13 A New York state bar. But I'm in what they --</p> <p>14 I believe it's called a retirement status.</p> <p>15 Q Does that mean you don't keep up your CLE and</p> <p>16 that sort of thing?</p> <p>17 A That's correct.</p> <p>18 Q You just -- so you -- you wouldn't actually</p> <p>19 be -- if you had to go get a certification of</p> <p>20 membership in good standing, you couldn't get one until</p> <p>21 you complied with your CLE requirements, as I</p> <p>22 understand it, correct?</p> <p>23 A I have no idea.</p> <p>24 Q Okay.</p> <p>25 A I pay a fee, I have a certain -- I get</p> |
| <p>19</p> <p>1 Partners. What's that?</p> <p>2 A It's just a consulting firm. Does --</p> <p>3 Q Where?</p> <p>4 A -- police consulting.</p> <p>5 Q Okay.</p> <p>6 And where did you consult for?</p> <p>7 A You mean who were the clients?</p> <p>8 Q Yeah.</p> <p>9 A It ranged from clients inside the United</p> <p>10 States to international clients, various police</p> <p>11 departments and governments.</p> <p>12 Q Was one of them the Boston Police Department?</p> <p>13 A Yes, sir.</p> <p>14 Q Okay. Then you left to join the U.S. Coast</p> <p>15 Guard Investigative Service in October of 2012?</p> <p>16 A Yes, sir.</p> <p>17 Q And you -- that's your present employer?</p> <p>18 A That is.</p> <p>19 Q And what are your duties and responsibilities</p> <p>20 there?</p> <p>21 A I serve as the director of the Coast Guard</p> <p>22 Investigative Service.</p> <p>23 Q Okay. So what does that amount to? Tell me</p> <p>24 what you do on a day-to-day basis.</p> <p>25 A I am the leader of all of -- I'm responsible</p> | <p>21</p> <p>1 letters from them on a regular basis to confirm my</p> <p>2 status.</p> <p>3 Q Can you practice law in the courts of the</p> <p>4 state of New York?</p> <p>5 A I don't know. I haven't looked into it. I</p> <p>6 don't -- I don't practice law in the state.</p> <p>7 Q You don't know if you can or you can't?</p> <p>8 A I have no idea.</p> <p>9 Q Okay. How about are you a member in the good</p> <p>10 standing of the bar association -- bar of any United</p> <p>11 States District Court, any U.S. Court of Appeals or the</p> <p>12 United States Supreme Court?</p> <p>13 A I have no idea. I don't know if that expires</p> <p>14 or have -- once having had that, if it expires. I just</p> <p>15 have no idea.</p> <p>16 Q Okay. Have you ever been disciplined or</p> <p>17 sanctioned by any bar association or any court of any</p> <p>18 competent jurisdiction?</p> <p>19 A Never.</p> <p>20 Q Okay.</p> <p>21 How long have you held yourself out as being</p> <p>22 available to do expert witness testimony?</p> <p>23 A I'm not sure I understand the question, sir.</p> <p>24 Q Well, you know, Mr. Osborne found you,</p> <p>25 looking for an expert. Did you have other people who</p> |

6 (Pages 18 to 21)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p style="text-align: right;">22</p> <p>1 hired you as a -- as being an expert in police matters 2 for testimonial purposes? 3 A At different times, yes, sir. 4 Q How long have you been doing that kind of 5 work? 6 A I've done it off and on. Very little of it, 7 frankly. So occasionally I get asked to do it. I 8 actually get asked to do it and very rarely do I take 9 on the engagements. 10 Q Okay. As I understand it, you haven't 11 testified in any matter in the last four years; is that 12 right? 13 A Not as an expert witness, no, sir. 14 Q How long have you had this fee schedule 15 that's page 2 of Exhibit 2? 16 A Page 2, Exhibit 2. I believe this would have 17 been put together when I left Kroll. So that would 18 have been right at the beginning of March of 2012. 19 Q Did you testify -- or did you review matters 20 to be an expert witness when you worked for Kroll? 21 A Yes, sir. This engagement started with 22 Kroll. 23 Q So this was put together after you left 24 Kroll, this fee -- 25 A Yes, sir.</p> | <p style="text-align: right;">24</p> <p>1 A It's a police pursuit case. 2 Q Okay. Where? 3 A Jacksonville, Florida. 4 Q How many cases have you had in the last four 5 years? 6 A I don't know the exact number. 7 Q Well, is it more than ten? 8 A Over the course of four years? 9 Q Yeah. 10 A Give me a date you want to start that time 11 clock with, sir. 12 Q Well, let's take four years from today. So 13 March of two thousand -- or February of 2009. 14 A Well, in February of 2009 I would have been 15 the chief of police in Savannah, so I wouldn't have 16 been taking cases, sir. 17 Q You didn't take any cases while you were 18 chief of police there? 19 A Not that I recall, no. 20 Q And how many have you taken after you left 21 Savannah, then? 22 A I don't recall the number. I've looked at a 23 number of cases. I've been asked to take a number of 24 cases. There was a small number of cases that I have 25 taken. And when I accepted the position with the Coast</p> |
| <p style="text-align: right;">23</p> <p>1 Q PolicyPartners.com, was that your email at -- 2 at your -- the consulting firm? 3 A Yes, sir. 4 Q Strategic Policy Partners? 5 A Yes, sir. 6 Q So you began this engagement when you were 7 working for Kroll; is that right? 8 A Yes, sir. 9 Q And continued in the Strategic Policy 10 Partners, correct? 11 A Yes, sir. 12 Q All right. Do you know, do you have any 13 understanding about, why you haven't been asked to 14 testify as an expert in trial or deposition in the last 15 four years? 16 A I'm sorry? 17 Q Do you know why you -- do you have a belief 18 as to why you have never testified in the last four 19 years? 20 A Just haven't taken cases, I don't believe, 21 that have gone to trial or been engaged in matters that 22 have -- where I've been asked to testify. 23 Q How many cases do you presently have? 24 A Right now I have this one and one other one. 25 Q What kind of case is the other one?</p> | <p style="text-align: right;">25</p> <p>1 Guard, the United States Coast Guard, I removed myself 2 from all the cases that I could ethically. 3 Q Okay. 4 (Reporter's Note: Sotto voce communication 5 between Mr. Bennett and Mr. Storms.) 6 BY MR. BENNETT: 7 Q Have you ever previously provided expert 8 testimony? 9 A In what context, sir? 10 Q Well, as an expert witness hired under Rule 11 702 of the Federal Rules of Evidence or the state 12 corollary. 13 A Have I been hired as an expert witness? 14 Q Yeah. 15 A Yes, sir. 16 Q How many times? 17 A I don't recall the exact number, sir. 18 Q Have you ever been deposed before? 19 A Yes, sir. 20 Q As an expert witness? 21 A Yes, sir. 22 Q Otherwise, other than as an expert witness? 23 As a fact witness have you been deposed? 24 A Yes, sir. 25 Q How many times?</p> |

7 (Pages 22 to 25)

Michael Berkow
2/25/2013

| | |
|--|--|
| <p style="text-align: right;">26</p> <p>1 A Again, I wouldn't have an exact number. A 2 number of times over the years. 3 Q Was the only consulting that you've done in 4 terms of expert witness testimony done after you were 5 done being a chief of police? 6 A No. I believe that I did have a couple of 7 cases while I still was. 8 Q Where? 9 A I believe that I did some expert work for the 10 City of Chicago. 11 Q Do you remember when that was? 12 A Not exactly, no, sir. 13 Q Do you remember what the case involved, who 14 the lawyers were? 15 A I'd have to go back and look for notes. 16 Q You don't know as you sit here today? 17 A No, sir. 18 Q When were you first contacted about this 19 case? 20 A I believe it was January or early February of 21 2012. 22 Q Who were you contacted by? 23 A I was asked by my boss, Bill Bratton, to 24 contact the City Attorney's Office here in Minneapolis 25 about a particular case, about this case.</p> | <p style="text-align: right;">28</p> <p>1 between Mr. Bennett and Mr. Storms.) 2 (Exhibit 4 was marked for identification.) 3 BY MR. BENNETT: 4 Q Are all the materials listed that you 5 reviewed in Exhibit 4 listed in Exhibit 1? 6 A You mean you want me to compare these two? 7 Q Yeah. What I mean, my guess is Exhibit 1 8 just is -- is documents that were added to the list of 9 things you reviewed, not subtracted. 10 A Yes, sir. 11 Q Okay. So Exhibit 1 would be the exhaustive 12 list of things you've now reviewed? 13 A Yes. Yes, sir. 14 Q And that lists all of the things that you 15 reviewed, as far as you know? 16 A As far as I can recall right now, yes, sir. 17 Q What did you review for your deposition 18 today? Anything else? 19 A Anything in addition to these? 20 Q Yes. 21 A No, sir. 22 Q Did you re-review anything in preparation for 23 today's deposition? 24 A I reread these two reports. I reread 25 Mr. Ryan's reports.</p> |
| <p style="text-align: right;">27</p> <p>1 Q And at that time you used the Kroll fee 2 schedule? 3 A Yes, sir. It might actually have been 4 earlier than that, because I know there was some 5 negotiation between Kroll and the City Attorney's 6 Office over the agreement. 7 Q What was the assignment you were given by the 8 people that hired you for this case? 9 A By the City Attorney's Office here? 10 Q Uh-huh. 11 A To review the facts surrounding this 12 particular case involving Mr. David Smith. 13 Q Other than the items listed in your report, 14 did you review any additional documents or material 15 prior to today's deposition? 16 A I'm sorry, which report are you referring to, 17 sir? 18 Q Exhibit 1. 19 A There's two reports. 20 So the most recent report? 21 Q Well, is there anything -- the -- your first 22 report... 23 I guess we -- we can mark that, too. 24 I don't have an extra copy of that. 25 (Reporter's Note: Sotto voce communication</p> | <p style="text-align: right;">29</p> <p>1 Q Okay. 2 A I looked at two of the videos. 3 Q Which ones? 4 A The -- well, the disks that I have them, 5 they're labeled as the "pen cam" and the "TASER cam." 6 And I believe I also reviewed a couple of 7 depositions, sir. 8 Q How much of the work was done at \$400 an hour 9 and how much was done at 250? 10 A I don't know exactly. It would be a -- I 11 don't know if anything was billed at \$400 an hour. If 12 it was, it would have been a very small number. 13 Q Okay. 14 A I don't know exactly, though, sir. 15 Q Did you read all of the depositions listed in 16 Exhibit 1 in their entirety? 17 A When, sir? 18 Q Before you wrote your report. 19 A Yes, sir. 20 Q You know what asphyxia is, don't you? 21 A I'm sorry? 22 Q Do you know what asphyxia is? 23 A I'm not sure what you're asking me. 24 Q The term "asphyxia," do you know what it 25 means?</p> |

8 (Pages 26 to 29)

Michael Berkow
2/25/2013

| | |
|---|---|
| <p style="text-align: right;">30</p> <p>1 A I'm not -- I'm not sure I know what you're</p> <p>2 talking about. No.</p> <p>3 Q So you -- are you aware of the related</p> <p>4 concepts of positional, mechanical, and restraint</p> <p>5 asphyxia?</p> <p>6 A I'm aware that there's a lot of terms that</p> <p>7 have been used in this case. I certainly have some</p> <p>8 knowledge of some of those terms.</p> <p>9 Q Which terms do you have knowledge of?</p> <p>10 A I would be most familiar with positional</p> <p>11 asphyxia.</p> <p>12 Q And when did you first become aware of that</p> <p>13 as a concept?</p> <p>14 A Oh, it's been -- I would guess probably in</p> <p>15 the very early 1980s.</p> <p>16 Q Positional asphyxia and mechanical asphyxia</p> <p>17 and restraint asphyxia are kind of talking about the</p> <p>18 same types of things, aren't they?</p> <p>19 A I don't know, sir. I'm trying to be very</p> <p>20 precise. And so you asked me so what I specifically</p> <p>21 know, and I'm aware of positional asphyxia, and...</p> <p>22 Q Okay.</p> <p>23 Are you aware that asphyxia has long been</p> <p>24 associated with the prone position in terms of police</p> <p>25 work?</p> | <p style="text-align: right;">32</p> <p>1 Q Yes.</p> <p>2 A No, sir.</p> <p>3 Q Have you ever been in charge of reviewing or</p> <p>4 implementing policies in that regard?</p> <p>5 A Specifically policies about...</p> <p>6 Not that I recall, no, sir.</p> <p>7 Q Have you ever worked for a police department</p> <p>8 that had policies reflecting the potential risks of</p> <p>9 maintaining subjects in a prone position for extended</p> <p>10 periods of time?</p> <p>11 A Can you repeat that, please?</p> <p>12 MR. BENNETT: Can you read it back, Jane?</p> <p>13 (The following was read back by the court</p> <p>14 reporter:</p> <p>15 "Have you ever worked for a police department</p> <p>16 that had policies reflecting the potential risks of</p> <p>17 maintaining subjects in a prone position for extended</p> <p>18 periods of time?")</p> <p>19 A I don't recall specific policies about that</p> <p>20 right now, no, sir. I'd have to review the policy</p> <p>21 manuals for the different agencies.</p> <p>22 BY MR. BENNETT:</p> <p>23 Q Do you know if the Minneapolis Police</p> <p>24 Department officers have received training reflecting</p> <p>25 the potential risks for -- related to maintaining</p> |
| <p style="text-align: right;">31</p> <p>1 A I'm aware that there have been issues about</p> <p>2 in-custody deaths and there have been questions about</p> <p>3 why people have ultimately died or been seriously</p> <p>4 injured during in-custody -- taking people into</p> <p>5 custody, securing them and moving them, yes, sir.</p> <p>6 Q Well, in fact, law enforcement entities</p> <p>7 nationwide have been training officers about risks</p> <p>8 associated with maintaining subjects in a prone</p> <p>9 position for a long time, haven't they?</p> <p>10 A I don't know what you're referring to, sir.</p> <p>11 Q You -- so you're not aware of it generally,</p> <p>12 that law enforcement entities nationwide will train its</p> <p>13 officers about the risks associated with maintaining</p> <p>14 the subjects in the prone position?</p> <p>15 A I think that it is difficult to make a</p> <p>16 statement generally about, quote -- "generally" was the</p> <p>17 word that you used about law enforcement in the United</p> <p>18 States. There's 19,000 law enforcement agencies, and</p> <p>19 so I'm very leery and concerned about the use of the</p> <p>20 word "generally."</p> <p>21 Q Well, let's ask: Have you ever provided</p> <p>22 training warning officers about potential risks</p> <p>23 relating -- related to maintaining subjects in a prone</p> <p>24 position for extended periods of time?</p> <p>25 A Provided training?</p> | <p style="text-align: right;">33</p> <p>1 subjects in a prone position for extended periods of</p> <p>2 time?</p> <p>3 A I certainly reviewed extensive period -- you</p> <p>4 know, amount of their training material. I don't</p> <p>5 recall the precise answer to that question right now,</p> <p>6 sir.</p> <p>7 Q Well, you'd be surprised, wouldn't you, if</p> <p>8 any officer working from, say, 2000 to 2010 for a major</p> <p>9 metropolitan police force had not learned at least on</p> <p>10 one occasion about the potential dangers associated</p> <p>11 with prone positioning and asphyxia? Correct?</p> <p>12 A I can't answer that question in that context,</p> <p>13 sir. As I've explained, there's too many police</p> <p>14 departments and there is no national standard.</p> <p>15 Q Are you aware that police officers have long</p> <p>16 been trained that the ideal medical position to place</p> <p>17 positions (sic) in to facilitate breathing is the</p> <p>18 seated or side recovery position?</p> <p>19 A I'm aware of a great deal of discussion. I'm</p> <p>20 aware of a great deal of --</p> <p>21 Q How about training?</p> <p>22 A Am I -- question, sir?</p> <p>23 Q Are you aware that officers have been trained</p> <p>24 that way?</p> <p>25 A I'm aware that there exists some training for</p> |

Michael Berkow
2/25/2013

| | |
|--|--|
| <p style="text-align: right;">34</p> <p>1 that, yes, sir.</p> <p>2 Q Do you know if Minneapolis has done that?</p> <p>3 A I don't recall as I sit here, sir.</p> <p>4 Q Have you read the depositions of the officers</p> <p>5 of the Minneapolis Police Department, other than</p> <p>6 Callahan and Gorman, that are listed in Exhibit 1?</p> <p>7 A Yes, sir, I did at one point in time.</p> <p>8 Q And in fact, every one of those officers,</p> <p>9 every one of them, testified they'd received that</p> <p>10 training, correct?</p> <p>11 A I don't recall that as I sit here now, sir.</p> <p>12 Q Okay.</p> <p>13 You and I can agree that an officer's use of</p> <p>14 force must be objectively reasonable under the Fourth</p> <p>15 Amendment, correct?</p> <p>16 A Yes, sir.</p> <p>17 Q And that the Minneapolis Police Department,</p> <p>18 like most police departments nationwide, have</p> <p>19 enacted -- has enacted policies that mirror the</p> <p>20 use-of-force obligations under the Fourth Amendment,</p> <p>21 correct?</p> <p>22 A I -- I will -- I'm sorry, I can't agree to a</p> <p>23 statement about most police departments.</p> <p>24 Q Well, how about the Minneapolis Police</p> <p>25 Department?</p> | <p style="text-align: right;">36</p> <p>1 authority and they've turned them over to medical</p> <p>2 facilities. So I think there's a variety of ways it</p> <p>3 can end.</p> <p>4 Q Okay. So release, turning the subject over</p> <p>5 to some kind of custodial facility, medical or legal,</p> <p>6 and -- or taking -- or releasing them to medical</p> <p>7 personnel, correct?</p> <p>8 A Yeah, I think, I believe that...</p> <p>9 Q Okay.</p> <p>10 And it's well and long established that an</p> <p>11 officer's conduct throughout the entirety of the</p> <p>12 seizure must be reasonable to comply with the Fourth</p> <p>13 Amendment, correct?</p> <p>14 A Yes, sir.</p> <p>15 Q Okay.</p> <p>16 And it is well established, prior to</p> <p>17 September of 2010, that officers have a duty to monitor</p> <p>18 the medical condition of any subject they have used</p> <p>19 force on once it becomes reasonable to do so?</p> <p>20 A I don't know -- I can't agree with that</p> <p>21 statement.</p> <p>22 Q You don't agree with it?</p> <p>23 A Well, I don't -- you've got a lot of very</p> <p>24 broad language in there. "Well established" --</p> <p>25 Q Well, "well established" just means it's</p> |
| <p style="text-align: right;">35</p> <p>1 A Yes, sir.</p> <p>2 Q Okay.</p> <p>3 And the Minneapolis Police Department has</p> <p>4 provided its officers with training to instruct the</p> <p>5 officers on use of force and the need for such force to</p> <p>6 be objectively reasonable, correct?</p> <p>7 A Yes, sir, I believe they have.</p> <p>8 Q The...</p> <p>9 And it has been well and long established</p> <p>10 that an officer's seizure of a subject starts when the</p> <p>11 officer restricts the subject's volitional movements by</p> <p>12 oral commands or physical action and ends when the</p> <p>13 officer either releases the subject or turns the</p> <p>14 subject over to jail or medical personnel; is that</p> <p>15 right?</p> <p>16 A I'll certainly agree with the beginning part</p> <p>17 of that statement. I guess the second part, it could</p> <p>18 be court or there would be other -- it depends on how</p> <p>19 you want to define "jail." Custody facilities, court</p> <p>20 facilities.</p> <p>21 Q Some other custodial facility or medical</p> <p>22 personnel?</p> <p>23 A Or -- or their probable cause to arrest has</p> <p>24 evaporated. Or if it's a mental hygiene arrest and</p> <p>25 they've seized someone pursuant to mental hygiene</p> | <p style="text-align: right;">37</p> <p>1 well-known in the industry. You make all sorts of --</p> <p>2 you make all sorts of representations in your report,</p> <p>3 which we'll go into, that what is inside contemporary</p> <p>4 police thinking, training and practice, and -- and what</p> <p>5 is generally -- what is consistent with generally</p> <p>6 accepted practices and procedures. And it is part of</p> <p>7 those generally accepted practices and procedures that</p> <p>8 establishes the duty to monitor the medical condition</p> <p>9 of a subject that has forced -- that force has been</p> <p>10 used on, correct?</p> <p>11 A I can't agree with that statement as you're</p> <p>12 stating it, no, sir.</p> <p>13 Q Okay. Okay.</p> <p>14 You don't agree that officers must monitor</p> <p>15 things like consciousness of the people they've used</p> <p>16 force on?</p> <p>17 A Sure. Absolutely.</p> <p>18 Q How about whether they're -- they're</p> <p>19 respirating, breathing?</p> <p>20 A Breathing. Yes, sir.</p> <p>21 Q Whether they're bleeding?</p> <p>22 A Absolutely. Yes, sir.</p> <p>23 Q Whether they've suffered any dangerous or</p> <p>24 life-threatening injuries?</p> <p>25 A Absolutely. Yes, sir.</p> |

10 (Pages 34 to 37)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p>38</p> <p>1 Q Whether they've suffered any injury that 2 requires the intervention of professional medical 3 personnel? 4 A I think you would have covered that in the 5 breathing or bleeding. 6 Q Well, he could be -- he could be breathing 7 and not -- not bleeding and having a stroke, for 8 example, couldn't you? Or an ascending aortic aneurysm 9 or a heart attack, right? 10 A I'm not a medical personnel, sir, but if -- I 11 believe if you -- what you're describing, the symptoms 12 would be so obvious that there would be a clear need to 13 get medical attention, yes, sir. 14 Q And medical monitoring requires an active 15 analysis on the -- on the part of the officer, does it 16 not? 17 A I -- you use the phrase "medical monitoring," 18 and I'm not quite sure what you mean by that. 19 Q Well, monitoring -- monitoring a person's 20 respiration, consciousness, and whether or not they're 21 injured requires a certain level of vigilance on the 22 part of the officer. Would you agree? 23 A Monitoring someone. Let's agree on the word 24 of "monitoring." 25 Q Yeah.</p> | <p>40</p> <p>1 been used, correct? 2 A In a -- in a general broad term, yes, sir. 3 Q Okay. 4 A "Vigilant" is a conclusion. 5 Q Well, then let's not use vigilant. You 6 should -- you have to be paying at least enough 7 attention to observe whether or not a subject is 8 conscious? 9 A You should be paying attention to the people 10 you've arrested to make sure that -- people that are in 11 your custody to make sure that they are not as we just 12 discussed. 13 Q Okay. 14 Now, Exhibit 1, your -- you wrote a 22 -- 15 that's a 22-page report, and I think there were 73 16 footnotes. Is that right? 17 A Yes, sir, 22 pages. And yes, sir, 73 18 footnotes. 19 Q And, Mr. Berkow, it appears to me that in -- 20 that within those -- that report, the 22 pages and the 21 73 footnotes, that there's no mention of or -- of 22 several issues critical to a Fourth -- to any Fourth 23 Amendment analysis of the conduct of Officers Gorman 24 and Callahan. Do you know what those issues are? 25 A I -- I don't understand your question, sir.</p> |
| <p>39</p> <p>1 A "Medical monitoring" I have trouble with, 2 because "medical monitoring" could have a wide variety 3 of applications. 4 Q Sure. But for the police officer, what 5 applications are -- if you're using force on a subject, 6 what are you monitoring, if you're a police officer? 7 A You're monitoring the subject just as you 8 described: To make sure that they're breathing, 9 they're not bleeding, they don't have some serious 10 injury that requires immediate medical attention. 11 Q And that requires that the officer pay 12 attention to those things, does it not? 13 A Yes, it does. 14 Q It requires a certain level of vigilance, 15 does it not? 16 A I'm not sure I would use the word 17 "vigilance," but a certain amount of attention. 18 Q Well, you don't want the officers -- I mean, 19 there may be situations certainly where they have to 20 pay attention to extraneous things, like if there's 21 someone who might endanger them near the -- near the 22 event, correct? 23 A Yes, sir. 24 Q But if the -- absent that, they should be 25 paying attention to the subject upon whom force has</p> | <p>41</p> <p>1 Q Well, I think -- I think you missed several 2 critical issues, and I want to understand if you did it 3 by mistake or by -- on purpose. Okay? So do you know 4 what issues you missed -- 5 MR. OSBORNE: Objection. 6 BY MR. BENNETT: 7 Q -- that don't appear in your report? 8 MR. OSBORNE: Argumentative. 9 A I have no idea what question you're asking 10 me, sir. I don't understand your question. 11 BY MR. BENNETT: 12 Q Well, you know, you -- I think you -- I think 13 Callahan -- you cite Callahan's statement in 13 14 footnotes. Do you want to look at that? And by "his 15 statement," I'm talking about Exhibit 37. Do you 16 want to -- do you want to count them? I have. 17 A If you'd like me to, I will. 18 Q Yeah. You can start with footnotes 14, 15, 19 16, 17, 18, 19, 21 -- 20 A I'm sorry. If you'll -- you'll have to give 21 me a pen, and want me to write those down, sir? 22 MR. OSBORNE: What do you want -- what's this 23 exercise all about, Bob? 24 MR. BENNETT: Well, hopefully it will become 25 clear. If you --</p> |

11 (Pages 38 to 41)

Michael Berkow
2/25/2013

| | | | |
|----|---|----|--|
| 42 | <p>1 MR. OSBORNE: Good, because it isn't now.</p> <p>2 MR. BENNETT: Look -- look -- it doesn't have</p> <p>3 to be now. And I don't have to make it clear to you,</p> <p>4 Burt.</p> <p>5 MR. OSBORNE: No, I know, but --</p> <p>6 BY MR. BENNETT:</p> <p>7 Q If you -- you start citing it on footnote</p> <p>8 number 14. So if you'd find footnote number 14. Do</p> <p>9 you see where you start there with "Callahan's"?</p> <p>10 A Yes, sir.</p> <p>11 Q Okay. And what you're citing to is</p> <p>12 Exhibit 37; is that right?</p> <p>13 A I don't know what Exhibit 37 is, sir.</p> <p>14 Q That's Callahan's statement to Sergeant Klund</p> <p>15 on the 15th of September 2010.</p> <p>16 A I believe it's a supplement of this other</p> <p>17 sergeant, Erick Fors.</p> <p>18 Q Well, but it's a statement of Officer Tim</p> <p>19 Callahan. Do you see that?</p> <p>20 A Yes, sir.</p> <p>21 Q Isn't that how you cite it?</p> <p>22 A Yes, sir.</p> <p>23 Q And did you cite it in footnote 13?</p> <p>24 A 13? No, sir.</p> <p>25 Q Oh, excuse me. 14?</p> | 44 | <p>1 A Let me just -- I'll just look at the actual</p> <p>2 Exhibit 37, if you don't mind.</p> <p>3 Q Sure.</p> <p>4 A May I grab this?</p> <p>5 Q Sure.</p> <p>6 A Yes, sir, the quote is here.</p> <p>7 Q Okay.</p> <p>8 23? I guess we just did 23.</p> <p>9 25?</p> <p>10 A We just -- we just did 19.</p> <p>11 23 --</p> <p>12 Q 19 and 21, excuse me.</p> <p>13 A 21.</p> <p>14 Q "See statement of Officer Callahan."</p> <p>15 A Yes, sir.</p> <p>16 Q 23, "See statement of Officer Callahan"?</p> <p>17 And you're citing about the facts of the --</p> <p>18 of what Mr. Smith was able to do and what he was -- and</p> <p>19 what he was -- for example, 23 is a footnote to the</p> <p>20 following sentence: "Officer Callahan subsequently</p> <p>21 drew his TASER, activating his TASER video, and he</p> <p>22 removed one of his hands from Mr. Smith to do so.</p> <p>23 Mr. Smith was able to get his" -- "get to his feet and</p> <p>24 momentarily break free from the officers, run away,"</p> <p>25 footnote 23, and you're referring to his statement.</p> |
| 43 | <p>1 A 14, yes, sir.</p> <p>2 Q 15?</p> <p>3 A 15, yes, sir.</p> <p>4 Q 16?</p> <p>5 A Yes, sir.</p> <p>6 Q 17?</p> <p>7 A No, sir.</p> <p>8 Q Yeah, well, look at 17. "See also statements</p> <p>9 of Officers Callahan and Gorman." That's what you're</p> <p>10 referring to there, when you say "See also"?</p> <p>11 A Let me read the...</p> <p>12 I could be referring to this or I could be</p> <p>13 referring to their deposition testimony.</p> <p>14 Q You -- but if you're --</p> <p>15 A It's covered in both places, that -- those</p> <p>16 comments.</p> <p>17 Q Okay. But a statement would be Exhibit 37,</p> <p>18 correct?</p> <p>19 A Could be, yes, sir.</p> <p>20 Q All right. Same thing with 18?</p> <p>21 A Yes, sir.</p> <p>22 Q 19?</p> <p>23 A Yes, sir.</p> <p>24 Q 21? That's what you're referring to,</p> <p>25 Exhibit 37? To Erick Fors?</p> | 45 | <p>1 Correct?</p> <p>2 A I believe so. I'm looking to see if I can</p> <p>3 find it in the statement, sir.</p> <p>4 Q Well, I -- I'm just looking at your report.</p> <p>5 So you don't -- you can look -- I'll refer you</p> <p>6 specifically to the statement, but you did make a</p> <p>7 reference to the statement for that fact, correct?</p> <p>8 A On -- on 23?</p> <p>9 Q Yeah, on page 9, footnote 23.</p> <p>10 A Yes, sir.</p> <p>11 Q Then you go to page 10, footnote 25, you cite</p> <p>12 Callahan statement for the fact that at that time</p> <p>13 Mr. Smith was able to punch Officer Callahan in the</p> <p>14 face, paren, jaw, close paren, and that Callahan was</p> <p>15 unable to block the punch, as he had one hand on Smith</p> <p>16 and the other hand was holding his TASER, and then you</p> <p>17 cite his statement again, correct?</p> <p>18 A Yes, sir.</p> <p>19 Q 26 is a footnote about what Mr. Smith did,</p> <p>20 and the -- and the -- and the attempts to handcuff him;</p> <p>21 is that right?</p> <p>22 A Yes, sir.</p> <p>23 Q 27 is a further description by Callahan of</p> <p>24 the struggle, correct, footnote 27?</p> <p>25 A I'm just looking for it, sir.</p> |

Michael Berkow
2/25/2013

| | |
|---|--|
| <p style="text-align: right;">46</p> <p>1 Yes, sir.</p> <p>2 Q And that -- and that goes to about to the</p> <p>3 physical conditioning?</p> <p>4 A Well, footnote -- hang on a second. Footnote</p> <p>5 27 --</p> <p>6 Q Physical positioning, excuse me.</p> <p>7 A Footnote 27 is about Gorman, not about --</p> <p>8 Q But -- but what you're doing is that Officer</p> <p>9 Callahan describes what Officer Gorman did in his</p> <p>10 statement, correct? That's an Id cite?</p> <p>11 A It is. And then it says, "And --</p> <p>12 Q "See statement of" --</p> <p>13 A -- "see statement of Gorman."</p> <p>14 Q Okay. And that's Exhibit 39?</p> <p>15 A So that would be a different exhibit, yes,</p> <p>16 sir.</p> <p>17 Q Yep. All right.</p> <p>18 Then go to page 12. Footnote 36 you cite the</p> <p>19 statement of Officer Callahan again?</p> <p>20 A What -- which footnote?</p> <p>21 Q 36.</p> <p>22 A 36? Just a second, I have to find it.</p> <p>23 Yes, sir.</p> <p>24 Q And 41 on page 14. Again, you cite the</p> <p>25 statement of Officer Callahan. Footnote 41.</p> | <p style="text-align: right;">48</p> <p>1 depositions from you or in other reports, that I don't</p> <p>2 recall exactly where I've seen it as I sit here.</p> <p>3 But --</p> <p>4 Q Well, it isn't in your report, is it?</p> <p>5 A I'd have to reread my report precisely,</p> <p>6 but --</p> <p>7 Q All right. Do you want to take the time to</p> <p>8 do that right now? It's fine with me.</p> <p>9 A It's up to you, sir.</p> <p>10 Q All right. We'll take a break. You read it.</p> <p>11 VIDEOGRAPHER: Off the video record at</p> <p>12 9:55 a.m.</p> <p>13 (Recess taken.)</p> <p>14 VIDEOGRAPHER: We're back on the video</p> <p>15 record. It is 10:06 a.m.</p> <p>16 BY MR. BENNETT:</p> <p>17 Q Mr. Berkow, you've had now an opportunity to</p> <p>18 read through your own report again, correct?</p> <p>19 A Yes, sir.</p> <p>20 Q And there is no citation to any of the</p> <p>21 language in Exhibit 37, page 5, that I read on the</p> <p>22 record before we broke, correct?</p> <p>23 A There is no specific cite to that paragraph,</p> <p>24 no, sir.</p> <p>25 Q Well, there's no specific cite in the</p> |
| <p style="text-align: right;">47</p> <p>1 A Yes, sir. Yes, sir.</p> <p>2 Q Okay.</p> <p>3 Now, I didn't read anywhere in your report --</p> <p>4 and so that's four -- that's -- what did I say? That's</p> <p>5 13 times you cited him. Did you ever mention or -- or</p> <p>6 cite in your 22-page, 73-footnote document the</p> <p>7 following language from the same exhibit, Exhibit 37,</p> <p>8 talking about that, "And it was at this point we were</p> <p>9 able to get his arms fully behind his back and</p> <p>10 handcuffed together. It was also at this time that</p> <p>11 Smith seemed to calm down a bit and was not resisting</p> <p>12 as hard. I believed that Smith was giving up at this</p> <p>13 time and complying?"</p> <p>14 Does that appear in Exhibit 1 at all? Any</p> <p>15 citation to that?</p> <p>16 A I don't recall. You didn't just point it out</p> <p>17 to me, though, sir.</p> <p>18 Q Well, I -- I --</p> <p>19 A I can certainly read the whole thing again.</p> <p>20 Q Well, you read it -- you read your report to</p> <p>21 get ready for your deposition today. You said that.</p> <p>22 A Yes, sir.</p> <p>23 Q Did you read that in that?</p> <p>24 A At this point in time I have seen that</p> <p>25 statement cited so many times, whether it's been in</p> | <p style="text-align: right;">49</p> <p>1 language regarding stopped -- stopping resisting,</p> <p>2 compliance, and giving up. Does not appear in your</p> <p>3 report, correct?</p> <p>4 A Those specific words do not.</p> <p>5 Q Those were the specific words of Officer Tim</p> <p>6 Callahan the first time he was asked about this,</p> <p>7 though, correct?</p> <p>8 A I don't know if it was the first time. It</p> <p>9 was the first time he was formally interviewed.</p> <p>10 Q Okay. Well, it's the first interview of him</p> <p>11 that you can look at?</p> <p>12 A Yes, sir.</p> <p>13 Q All right. The first one I can look at and</p> <p>14 the first one the jury will be able to look at,</p> <p>15 correct?</p> <p>16 A Best of my knowledge, yes, sir.</p> <p>17 Q He's represented by counsel?</p> <p>18 A Yes, sir.</p> <p>19 Q And would it be correct to say that a Fourth</p> <p>20 Amendment analysis of use of force would necessarily</p> <p>21 include the fact when the officer using the force</p> <p>22 perceived that the subject of the -- a force was giving</p> <p>23 up, complying, not resisting?</p> <p>24 A Yes, I think that would absolutely be a</p> <p>25 factor.</p> |

13 (Pages 46 to 49)

Michael Berkow
2/25/2013

| | |
|---|---|
| <p>50</p> <p>1 Q They are critical factors, aren't they?</p> <p>2 A I think it is absolutely a factor.</p> <p>3 Q Well, let's just take an example outside of</p> <p>4 this case, because I think it's so stark and so real.</p> <p>5 I could show you the videotape of it, for example.</p> <p>6 The police officers are engaged in a chase of</p> <p>7 a person they believe may have a gun. They're chasing</p> <p>8 him in squads and on foot. Okay? Do you have that in</p> <p>9 mind?</p> <p>10 A Yeah, it's a foot chase or a car chase?</p> <p>11 Q Both. Well, the police are in cars and on</p> <p>12 foot. And the perpetrator, the suspect, is on foot.</p> <p>13 A Okay, sir.</p> <p>14 Q He runs, he gets -- runs to kind of a</p> <p>15 dead-end alley, tries to climb a large chain-link</p> <p>16 fence, realizes he's not going to get across. Turns</p> <p>17 around. Puts his hands up in the air --</p> <p>18 MR. BENNETT: Like this, Jayme.</p> <p>19 (Demonstrating.)</p> <p>20 BY MR. BENNETT:</p> <p>21 Q So his hands are visible to all officers and</p> <p>22 the squad video. Okay?</p> <p>23 A Yes, sir.</p> <p>24 Q Would you -- would you recognize that as a</p> <p>25 sign of surrender and acquiescence to police authority?</p> | <p>52</p> <p>1 giving up or at least your use of forces are</p> <p>2 restricted, correct?</p> <p>3 A The use of all force is judged by a standard</p> <p>4 of is it objectively reasonable.</p> <p>5 Q Yeah. And it is objectively unreasonable to</p> <p>6 use force of any significance on a person that is</p> <p>7 giving up, correct?</p> <p>8 A I think "giving up" covers a lot of ground,</p> <p>9 so you'd have to give me specific facts to -- to answer</p> <p>10 that.</p> <p>11 Q It was on the video, right? You saw the</p> <p>12 video of David Smith?</p> <p>13 A I'm sorry, you were pointing at something and</p> <p>14 then asking me a different question.</p> <p>15 Q Exhibit 37 is what I'm pointing at.</p> <p>16 A Yes, sir.</p> <p>17 Q Paragraph 5.</p> <p>18 A Yes, sir.</p> <p>19 Q Callahan's own words.</p> <p>20 A Yes, sir.</p> <p>21 Q Callahan perceives subjectively that David</p> <p>22 Smith is giving up and complying; doesn't he state</p> <p>23 that?</p> <p>24 A That is not what he states.</p> <p>25 Q All right. Let's just -- let's read exactly</p> |
| <p>51</p> <p>1 A Yes, sir, that certainly suggests that, yeah.</p> <p>2 Q So it would then be improper under any</p> <p>3 reasonable Fourth Amendment analysis for the officers</p> <p>4 to strike him in the head several times, kick him and</p> <p>5 hit him with ASP while his hands are up in the air,</p> <p>6 correct?</p> <p>7 A I don't know all the facts. Sounds like</p> <p>8 you're relating a very specific case.</p> <p>9 Q I am.</p> <p>10 A But the fact pattern as you've described it,</p> <p>11 with that limited, absolutely.</p> <p>12 Q Well, I'm just describing what was on the</p> <p>13 video.</p> <p>14 MR. OSBORNE: Well, he hasn't seen the video</p> <p>15 you're talking about, Bob. I mean, you know, he's</p> <p>16 trying to answer the best he can.</p> <p>17 A You're asking me a hypothetical with a</p> <p>18 limited set of facts.</p> <p>19 BY MR. BENNETT:</p> <p>20 Q I am. But the key to that is his hands in</p> <p>21 the air, compliance, acquiescence, stopping flight, and</p> <p>22 stopping any fighting. Correct? Putting your hands</p> <p>23 up, giving up, is really important, isn't it?</p> <p>24 A Giving up is absolutely a factor.</p> <p>25 Q You cannot use force on somebody who is</p> | <p>53</p> <p>1 what he states.</p> <p>2 Beliefs are subjective, right?</p> <p>3 A Pardon me?</p> <p>4 Q Beliefs are subjective as opposed to</p> <p>5 objective. Correct? What he -- what he states -- do</p> <p>6 you agree that beliefs are subjective?</p> <p>7 A I'm not sure I understand what you're asking</p> <p>8 me about, sir.</p> <p>9 Q Well --</p> <p>10 A You're jumping from --</p> <p>11 Q Well, do you know the difference between</p> <p>12 objective and subjective?</p> <p>13 A Yes, sir.</p> <p>14 Q What's subjective?</p> <p>15 A Subjective is what I -- if I believe, for</p> <p>16 example, that you're hostile or you're --</p> <p>17 Q All right.</p> <p>18 A Conclusionary statements.</p> <p>19 Q And the question is would an objective review</p> <p>20 of the same facts come to that conclusion. That's a</p> <p>21 different -- that's an objective review, correct?</p> <p>22 A I'm sorry, say that once more?</p> <p>23 Q If -- if other people looking at the same</p> <p>24 facts would believe that to be true is -- is an</p> <p>25 objective analysis?</p> |

Michael Berkow
2/25/2013

| | | | |
|----|---|----|---|
| 54 | <p>1 A I believe it's the hypothetical reasonable</p> <p>2 person, sir.</p> <p>3 Q Correct. All right.</p> <p>4 Well, Callahan, first time he talks about it</p> <p>5 on recorded with his attorney, says, "And it was at</p> <p>6 this point we were able to get his arms fully behind</p> <p>7 his back and handcuffed together."</p> <p>8 Do you know where that is in the video?</p> <p>9 A Where they get him handcuffed?</p> <p>10 Q Yeah. Do you have that in mind in the video?</p> <p>11 A What do you mean by that, have in mind?</p> <p>12 Q Do you have a visual recollection of them</p> <p>13 getting him handcuffed and his hands behind his back?</p> <p>14 A I have a recollection there's a point in time</p> <p>15 in the videos where, yes, they do.</p> <p>16 Q And he says, "It was also at this time that</p> <p>17 Smith seemed to calm down a bit and was not resisting</p> <p>18 as hard. I believed that Smith was giving up at this</p> <p>19 time and complying."</p> <p>20 I read that correctly, didn't I?</p> <p>21 A You read the statement, yes, sir.</p> <p>22 Q All right. Those are Callahan's words, not</p> <p>23 words anybody else picked. Those are his words?</p> <p>24 A Yes, sir.</p> <p>25 Q All right. So compliance and giving up are</p> | 56 | <p>1 BY MR. BENNETT:</p> <p>2 Q And whether a person is adequately controlled</p> <p>3 by handcuff is important to a Fourth Amendment</p> <p>4 analysis, isn't it?</p> <p>5 A I'm not sure what he means -- that's -- first</p> <p>6 of all, you're showing me one snippet of a very long</p> <p>7 deposition. I'm not sure --</p> <p>8 Q Did you -- did you read that snippet?</p> <p>9 A Did I read that snippet now?</p> <p>10 Q Yeah.</p> <p>11 A Just now?</p> <p>12 Q And --</p> <p>13 A Yes, sir, I did.</p> <p>14 Q And did you read it when you read his</p> <p>15 deposition?</p> <p>16 A At some point in time, yes, sir, I did.</p> <p>17 Q So you read the whole context of the</p> <p>18 deposition?</p> <p>19 A Yes, sir.</p> <p>20 Q You didn't cite that portion of note in your</p> <p>21 report that he -- that Callahan believed he was</p> <p>22 adequately controlled?</p> <p>23 A There's a number of things I didn't cite</p> <p>24 specifically.</p> <p>25 Q I know. And I want to talk about those --</p> |
| 55 | <p>1 important concepts in any Fourth Amendment analysis; we</p> <p>2 agreed on that, right?</p> <p>3 A Yes, sir.</p> <p>4 Q Did you -- and I note also that you didn't</p> <p>5 cite in -- in your 22-page, 73-footnote report the fact</p> <p>6 that Officer Callahan also said that he believed that</p> <p>7 David Smith was adequately controlled by handcuffing.</p> <p>8 He did testify to that, didn't he?</p> <p>9 A I don't recall that specific sentence, sir.</p> <p>10 Q All right.</p> <p>11 (Reporter's Note: Sotto voce communication</p> <p>12 between Mr. Bennett and Mr. Storms.)</p> <p>13 BY MR. BENNETT:</p> <p>14 Q You might want to take a look.</p> <p>15 (Video clip shown of the following questions</p> <p>16 and answers from the January 30, 2012 testimony of</p> <p>17 Officer Timothy Callahan:</p> <p>18 "Well, was David Smith a subject who was not</p> <p>19 adequately controlled by handcuffing?</p> <p>20 "No. I would say that once we had him</p> <p>21 handcuffed, we had him --</p> <p>22 "Adequately controlled?</p> <p>23 "I -- I -- I think so.")</p> <p>24 (End of video clip.)</p> <p>25</p> | 57 | <p>1 A But I --</p> <p>2 Q -- things in particular.</p> <p>3 I agree. I just want to figure out if it was</p> <p>4 by mistake or on -- or by conscious choice.</p> <p>5 The -- let me ask you this. This is the</p> <p>6 training officer, Sergeant Anderson.</p> <p>7 (Video clip shown of the following questions</p> <p>8 and answers from the October 2, 2012 testimony of</p> <p>9 Sergeant Brian Anderson:</p> <p>10 "Was it consistent with MPD training prior to</p> <p>11 September 9, 2010 to kneel on a subject's back for</p> <p>12 approximately four and a half minutes after the subject</p> <p>13 had been adequately controlled?</p> <p>14 "No.")</p> <p>15 (End of video clip.)</p> <p>16 BY MR. BENNETT:</p> <p>17 Q Did you read Sergeant Anderson's deposition,</p> <p>18 the Rule 30(b)(6) deposition?</p> <p>19 A At some point, yes, sir, I have.</p> <p>20 Q He was the training expert officer?</p> <p>21 A Yes, sir.</p> <p>22 Q All right. And was that statement by Officer</p> <p>23 Anderson -- or Sergeant Anderson, excuse me, was that</p> <p>24 consistent -- was his testimony consistent with</p> <p>25 generally accepted practices and procedures of properly</p> |

15 (Pages 54 to 57)

Michael Berkow
2/25/2013

| | |
|--|---|
| <p>58</p> <p>1 trained and prudent law enforcement officers?</p> <p>2 A I'm not sure I can answer your question the</p> <p>3 way you're asking --</p> <p>4 Q Why?</p> <p>5 A -- sir.</p> <p>6 Pardon me?</p> <p>7 Q What's wrong with my question?</p> <p>8 A Well, to start with, the way you phrased the</p> <p>9 question to him, it was "kneeling on."</p> <p>10 Q Yeah.</p> <p>11 A You'd have to define for me what you mean by</p> <p>12 "kneeling on."</p> <p>13 Q You saw Gorman kneeling on him, didn't you?</p> <p>14 A I did not.</p> <p>15 Q You didn't?</p> <p>16 A No, sir.</p> <p>17 Q Really?</p> <p>18 A No, sir.</p> <p>19 Q What did you see?</p> <p>20 A I saw Gorman with a knee on him. That's why</p> <p>21 I'm saying, let's define "kneeling."</p> <p>22 Q What -- what is kneeling? You've got to have</p> <p>23 both knees down? Like some Catholics have one knee</p> <p>24 down in church and some have two. So what -- is</p> <p>25 there -- I mean, is one not kneeling and one is?</p> | <p>60</p> <p>1 at his -- his testimony again.</p> <p>2 Q Okay. All right.</p> <p>3 Look at this.</p> <p>4 So you don't -- you don't think that -- is it</p> <p>5 your position that Sergeant Anderson's answer there was</p> <p>6 not consistent with generally accepted -- and I'm using</p> <p>7 the words from your own report -- generally accepted</p> <p>8 practices and procedures of properly trained and</p> <p>9 prudent law enforcement officers?</p> <p>10 A Officer Anderson is responding to a question</p> <p>11 from you, sir. It's not clear to me that -- what</p> <p>12 you're talking about in terms of kneeling, and so --</p> <p>13 Q Is his answer consistent with generally</p> <p>14 accepted practices or procedures of properly trained</p> <p>15 and prudent law enforcement officers?</p> <p>16 A You'd have to explain to me exactly what</p> <p>17 you're -- you expected him --</p> <p>18 Q If you want to say no, say no, if you want to</p> <p>19 say yes, say yes, but give me an answer.</p> <p>20 A I'm giving an answer, sir.</p> <p>21 Q You heard his testimony. Based solely on his</p> <p>22 testimony, is it true or not true?</p> <p>23 A His testimony is responsive to the way you</p> <p>24 phrased the question and his understanding. I can't</p> <p>25 tell you what was in his head.</p> |
| <p>59</p> <p>1 A I would -- to me, "kneeling" is -- has a</p> <p>2 specific meaning that you are -- both knees are on</p> <p>3 someone --</p> <p>4 Q Oh.</p> <p>5 A -- and -- and so I think there's been some</p> <p>6 lack of clarity in --</p> <p>7 Q Oh, really.</p> <p>8 A -- some of the questioning.</p> <p>9 Q I see.</p> <p>10 Did you ever see Gorman with both knees on</p> <p>11 him?</p> <p>12 A From the video, it appears he switches knees.</p> <p>13 Q Did you ever see him with both knees on him?</p> <p>14 A There may have been a second while he's</p> <p>15 switching knees, yes, sir.</p> <p>16 Q So then he'd be kneeling on him?</p> <p>17 A Yes, sir.</p> <p>18 Q Would you agree that he kept --</p> <p>19 A He'd have both knees on him for a period of</p> <p>20 time.</p> <p>21 Q Well, you read Gorman's deposition, right?</p> <p>22 A Yes, sir.</p> <p>23 Q He says he was kneeling on him for four and a</p> <p>24 half minutes with one or both knees, correct?</p> <p>25 A I -- I don't recall that. I'd have to look</p> | <p>61</p> <p>1 MR. STORMS: Well, his attorney didn't object</p> <p>2 as vague, and I asked the question. It seemed like he</p> <p>3 understood the answer and his attorney obviously did.</p> <p>4 BY MR. BENNETT:</p> <p>5 Q You don't understand the question?</p> <p>6 A I'm not testifying for him, sir.</p> <p>7 Q All right. Well, all I'm asking is you say a</p> <p>8 number of things that are consistent with --</p> <p>9 MR. OSBORNE: And I don't always object when</p> <p>10 questions are vague. I mean, you know, otherwise I'd</p> <p>11 be objecting a lot more.</p> <p>12 BY MR. BENNETT:</p> <p>13 Q So you don't have an opinion one way or</p> <p>14 another whether that -- whether Sergeant Anderson's</p> <p>15 testimony in that specific instance is consistent with</p> <p>16 generally accepted practices and procedures of properly</p> <p>17 trained and prudent law enforcement officers? Is that</p> <p>18 correct? You don't have an opinion?</p> <p>19 A My answer is that from the question that</p> <p>20 you've asked him, I'm not clear what he's responding</p> <p>21 to, because you and I have already established we don't</p> <p>22 agree what "kneeling" means.</p> <p>23 Q Okay.</p> <p>24 A You used it in a different way than I would</p> <p>25 use it.</p> |

16 (Pages 58 to 61)

Michael Berkow
2/25/2013

| | | | |
|----|--|----|--|
| 62 | <p>1 Q All right. Let's see.</p> <p>2 (Video clip shown of the following questions</p> <p>3 and answers from the October 2, 2012 testimony of</p> <p>4 Sergeant Brian Anderson:</p> <p>5 "Well, he just gave you a hypothetical that</p> <p>6 was pretty clear, though. If the person was cuffed and</p> <p>7 had given up and was complying. Right, Jeff?")</p> <p>8 MR. BENNETT: That's Mr. Osborne.</p> <p>9 ("Would it be consistent with policy to</p> <p>10 continue kneeling on that person's back for four</p> <p>11 minutes and 30 seconds?</p> <p>12 "No.</p> <p>13 "Okay. Would it have been consistent with</p> <p>14 training prior to September of 2010 to continue</p> <p>15 kneeling on a subject's back under those circumstances?</p> <p>16 "No.")</p> <p>17 (End of video clip.)</p> <p>18 BY MR. BENNETT:</p> <p>19 Q Now, let's forget your -- whatever your</p> <p>20 interpretation. Let the jury decide what's kneeling,</p> <p>21 if you have to -- if you have -- if it's a two-knee</p> <p>22 requirement or a one-knee requirement.</p> <p>23 The...</p> <p>24 Is Sergeant Anderson's answer, the training</p> <p>25 officer, is it consistent with generally accepted</p> | 64 | <p>1 "I know that the last time I activated the</p> <p>2 TASER was the time prior to we -- us handcuffing him.</p> <p>3 "All right. So once the -- the last TASER</p> <p>4 cycle immediately precedes the final handcuffing?</p> <p>5 "Yes.</p> <p>6 "Correct? And one -- you said, 'It was also</p> <p>7 at this time...' And I assume you're meaning in this</p> <p>8 answer at the time you got him handcuffed -- 'that</p> <p>9 Smith seemed to calm down a bit.' You said that,</p> <p>10 right?</p> <p>11 "I did say that.</p> <p>12 "And he was not resisting as hard?</p> <p>13 "Yes.</p> <p>14 "And you believed that Smith was giving up at</p> <p>15 this time and complying, correct?</p> <p>16 "Yes.</p> <p>17 "And when a person does that the excuse for</p> <p>18 force abates? Ends? Correct?</p> <p>19 "Yes.")</p> <p>20 (End of video clip.)</p> <p>21 BY MR. BENNETT:</p> <p>22 Q Do you agree with Officer Callahan?</p> <p>23 A Generally, yes.</p> <p>24 Q Okay. And that is -- Officer Callahan's</p> <p>25 answers are consistent with generally accepted</p> |
| 63 | <p>1 practices and procedures of properly trained and</p> <p>2 prudent law enforcement officers facing similar</p> <p>3 circumstances?</p> <p>4 A If you're referring to full kneeling --</p> <p>5 Q I'm -- I'm -- there's no full kneeling. The</p> <p>6 question and answer as asked.</p> <p>7 A Then I cannot answer the question as asked.</p> <p>8 Q All right. That's fine. You don't have an</p> <p>9 opinion, then. All right. That's fine.</p> <p>10 (Video clip shown of the following questions</p> <p>11 and answers from the January 30, 2012 testimony of</p> <p>12 Officer Timothy Callahan:</p> <p>13 "And you said, 'I know I activated it at</p> <p>14 least one more time.' And that would have been the</p> <p>15 final time? You had five cycles in your TASER,</p> <p>16 correct?</p> <p>17 "I believe I was told that there were five</p> <p>18 cycles.</p> <p>19 "I can show you the TASER record, and you</p> <p>20 wouldn't deny --</p> <p>21 "I don't disagree.</p> <p>22 "Okay. And you say, 'It was at this point</p> <p>23 that we were able to get the arms fully behind his back</p> <p>24 and handcuffed together,' correct? That's what you</p> <p>25 said?</p> | 65 | <p>1 practices and procedures of properly trained and</p> <p>2 prudent law enforcement officers facing similar</p> <p>3 circumstances, correct?</p> <p>4 A Generally, yes, sir.</p> <p>5 Q Okay.</p> <p>6 How do you define "kneeling"? I want to</p> <p>7 get -- you give me your definition of kneeling, because</p> <p>8 I don't -- I don't -- want to be sure that I understand</p> <p>9 exactly what you mean.</p> <p>10 A In the context of this case?</p> <p>11 Q No. I mean what does the word "kneeling"</p> <p>12 mean?</p> <p>13 A I think "kneeling" can have a variety of</p> <p>14 meanings, depending on the context.</p> <p>15 Q Oh. Okay.</p> <p>16 Well, what about the context of -- well, you</p> <p>17 tell me what your -- what you understand the word</p> <p>18 "kneeling" to mean.</p> <p>19 A Again, I think "kneeling" can have a variety</p> <p>20 of meanings, depending on the context. So if I'm in a</p> <p>21 firearm shooting course, there are different kneeling</p> <p>22 positions, and you define them and you say, okay, a</p> <p>23 single-kneel kneeling position, a two-knee kneeling</p> <p>24 position. So there are different positions, but the</p> <p>25 term "kneeling" is used for both sets of circumstances.</p> |

Michael Berkow
2/25/2013

| | |
|---|--|
| <p>66</p> <p>1 They have different practical -- practical, visible, 2 real meaning. 3 Q Really. 4 A Yes, sir. 5 Q Well, you know all the officers that were 6 questioned about kneeling in this case saw the videos, 7 don't you? 8 A I don't know that at all. 9 Q Did you see the video? 10 A Yes, sir. 11 Q Did you know what I meant by "kneeling"? 12 A Do I know what you meant by "kneeling"? 13 Q Correct. 14 A No, sir. We've never talked until today. 15 Q Well, let's assume I meant the kneeling 16 that's depicted on the videos. 17 A Okay, sir. 18 Q That would be a kneeling like a single-knee 19 kneeling like you talked about for shooting, right? 20 A Yes, sir. 21 Q And why do you do -- why do you use a 22 single-knee position in shooting? 23 A It's a stabilized position -- 24 Q Correct. 25 A -- basically.</p> | <p>68</p> <p>1 Q Well, a lot of times -- 2 A That would be my belief as to whether or not 3 he understood it. 4 Q A lot of times when the answers are damning, 5 they hesitate a bit, don't they? 6 MR. OSBORNE: Objection; argumentative. 7 A Is that a question for me? 8 BY MR. BENNETT: 9 Q Yeah. 10 A I think there are a variety of reasons why 11 people could hesitate before answering the questions. 12 Q Okay. 13 A Make sure they understand the wording, make 14 sure they understand the context. 15 Q Conceive of the answer in their head? 16 A Sure. 17 Q Okay. 18 But the answer he gave was unequivocal, 19 "Yes," wasn't it? 20 A Yes, sir. 21 Q And neither Officer nor Officer -- neither 22 Officer Callahan nor Officer Gorman describe any 23 resistant behavior after Gorman hits him in the head, 24 on the video? 25 A I'm not sure that I see a hit to the head, so</p> |
| <p>67</p> <p>1 Q You use the knee to stabilize, correct? 2 A Well, it's stabilizing or you're behind 3 cover. There can be a variety of reasons. 4 Q Okay. 5 And the reason for force abates when a person 6 gives up is a common, critical law enforcement 7 principle in terms of Fourth Amendment analysis, 8 correct? 9 A When they give up? 10 Q Yeah. 11 A Surrender? Yes, sir. 12 Q Yeah. Comply. 13 A Yes, sir. 14 Q And you know that Mr. Callahan -- you -- did 15 you know that's -- you looked at Officer Callahan 16 there, right? 17 A Looked at him on the video? Yes, sir. 18 Q He understood, he didn't indicate any lack of 19 knowledge about my questions, did he? 20 A I would be speculating as to whether he -- 21 Q Well, in the answer you just saw, did he have 22 any problem understanding my questions? 23 A I noticed some significant hesitation before 24 he answered, but he certainly answered them. So I 25 would --</p> | <p>69</p> <p>1 you'll have to take me through where you're -- you're 2 timing that and what you mean by that, sir. 3 Q You never -- you didn't see a hit on the 4 head? 5 A Not an unequivocal hit, yes, no, sir, I did 6 not. 7 Q Well, didn't Officer Gorman try that in his 8 deposition, that -- say it was unequivocal, and then he 9 just gave up after I showed him the video three times? 10 Do you remember that? 11 A I'd be -- I'm not aware of what he said in 12 his -- I don't recall what he said in his video -- in 13 his -- 14 Q Well, his deposition -- 15 A -- deposition. Excuse me. 16 Q Well, if I described that accurately, you 17 don't -- you don't remember that? He tried to say, 18 well, it was kind of a light cuff, it was this or that, 19 and then he said, "Well, I actually did hit him." Do 20 you remember that? 21 A I recall a discussion, an extended 22 discussion, about that, but I don't recall what his 23 specific answers were. 24 Q You don't mention Gorman hitting him in the 25 head, do you, in your report?</p> |

18 (Pages 66 to 69)

Michael Berkow
2/25/2013

| | |
|---|---|
| <p style="text-align: right;">70</p> <p>1 A I just said I don't see it, an unequivocal</p> <p>2 hit to the head. I've certainly read a lot of</p> <p>3 testimony about something. Again, I think words are</p> <p>4 important. "Hit" has a very --</p> <p>5 Q Words are important. How about the word</p> <p>6 "motherfucker"? Is that important?</p> <p>7 A Yes.</p> <p>8 Q Okay. Did you hear the word "motherfucker"</p> <p>9 on the tape?</p> <p>10 A Yes, sir.</p> <p>11 Q And who was that used by and who was it used</p> <p>12 to?</p> <p>13 A I believe it was used by Officer Callahan.</p> <p>14 Q And who was he calling a "motherfucker"?</p> <p>15 A He -- I believe he was directing it to</p> <p>16 Mr. Smith.</p> <p>17 Q Okay. And do you find that to be a term of</p> <p>18 endearment? Have you felt that over the years?</p> <p>19 MR. OSBORNE: Objection; argumentative.</p> <p>20 MR. BENNETT: Really?</p> <p>21 MR. OSBORNE: Yeah.</p> <p>22 BY MR. BENNETT:</p> <p>23 Q Is it a term of endearment, "motherfucker"?</p> <p>24 A Generally, no.</p> <p>25 Q Okay. In fact, it implies some animus, does</p> | <p style="text-align: right;">72</p> <p>1 the tape where it is clear that Tim Callahan takes</p> <p>2 David Smith's pulse?</p> <p>3 A I don't believe that is the accurate</p> <p>4 statement of what occurred.</p> <p>5 Q Oh, really? So you didn't cite their</p> <p>6 testimony that admits that?</p> <p>7 A I'm not sure what you're referring to, sir.</p> <p>8 Q Okay.</p> <p>9 Does -- do the words "recovery position"</p> <p>10 appear in your report?</p> <p>11 A I don't believe so, no, sir.</p> <p>12 Q Do you know what a recovery position is, or</p> <p>13 is that a little like kneeling?</p> <p>14 Well, that's argumentative. Forget it.</p> <p>15 Do you know -- do you know what the word --</p> <p>16 what the words "recovery position" mean in police</p> <p>17 vernacular?</p> <p>18 A I've certainly heard it used in this case and</p> <p>19 seen discussion of it in this case, yes.</p> <p>20 Q Have you heard it -- have you seen it in the</p> <p>21 training videos done by the New York medical examiner?</p> <p>22 A I don't believe so, no, sir.</p> <p>23 Q Okay. Have you -- have you seen it in</p> <p>24 connection with training materials relating to excited</p> <p>25 delirium?</p> |
| <p style="text-align: right;">71</p> <p>1 it not, some -- some anger?</p> <p>2 A It can, certainly.</p> <p>3 Q Okay.</p> <p>4 A Again, context is important. But certainly</p> <p>5 can. Absolutely.</p> <p>6 Q Okay. Did you cite anywhere in the testimony</p> <p>7 of, in your report from Officers Gorman and Callahan</p> <p>8 that -- that -- where both of them agree that they did</p> <p>9 nothing to actively monitor the level of consciousness</p> <p>10 or respiration of David Smith until the first time that</p> <p>11 Tim Callahan takes his pulse?</p> <p>12 A I'm sorry, repeat that question, sir. It has</p> <p>13 a lot of pieces.</p> <p>14 MR. BENNETT: Can you read it back?</p> <p>15 (The following was read back by the court</p> <p>16 reporter:</p> <p>17 "Did you cite anywhere in the testimony, in</p> <p>18 your report, from Officers Gorman and Callahan</p> <p>19 that" --)</p> <p>20 MR. BENNETT: I'll start over, because I...</p> <p>21 BY MR. BENNETT:</p> <p>22 Q Did you cite anywhere in the text of your</p> <p>23 report the testimony of Officer Callahan and Officer</p> <p>24 Gorman that they did nothing to actively monitor David</p> <p>25 Smith's consciousness or respiration until the time on</p> | <p style="text-align: right;">73</p> <p>1 A The specific phrase "recovery position"?</p> <p>2 Q Correct.</p> <p>3 A Not that I recall, no, sir.</p> <p>4 Q Have you seen it in the TASER training</p> <p>5 materials and manual?</p> <p>6 A "Recovery position"?</p> <p>7 Q Correct.</p> <p>8 A Not that I recall.</p> <p>9 Q Okay.</p> <p>10 Did you look at the -- did you cite the</p> <p>11 testimony of now Police Chief Janee Harteau in any of</p> <p>12 your 73 footnotes?</p> <p>13 A I don't believe so, no, sir.</p> <p>14 Q How about the testimony of Captain Amelia</p> <p>15 Huffman?</p> <p>16 A I don't -- I don't recall exactly. I don't</p> <p>17 think so, no, sir.</p> <p>18 Q How about the testimony of Sergeant Brad</p> <p>19 Anderson, the Rule 30(b)(6) training representative of</p> <p>20 the Minneapolis Police Department?</p> <p>21 A I might have cited him, didn't I? I don't</p> <p>22 recall. I'd have to look. If you'd like, I'll look.</p> <p>23 Q Go ahead and look.</p> <p>24 MR. OSBORNE: Bob, I think you called him</p> <p>25 Brad Anderson. I think it's Jason.</p> |

19 (Pages 70 to 73)

Michael Berkow
2/25/2013

| | |
|--|--|
| <p style="text-align: right;">74</p> <p>1 MR. BENNETT: No. Jason Case, isn't it?</p> <p>2 It's Brad Anderson.</p> <p>3 MS. BENNETT: Brian.</p> <p>4 MR. BENNETT: Brian Anderson?</p> <p>5 MR. OSBORNE: Brian. We're both wrong.</p> <p>6 MR. BENNETT: Okay. That wouldn't surprise</p> <p>7 me, that we were both wrong.</p> <p>8 Can we -- well, I'm sorry.</p> <p>9 BY MR. BENNETT:</p> <p>10 Q It's Brian Anderson.</p> <p>11 A Yeah, I understand, sir.</p> <p>12 No, sir, I did not.</p> <p>13 BY MR. BENNETT:</p> <p>14 Q What about Lieutenant Zimmerman?</p> <p>15 A Not that I recall, no, sir.</p> <p>16 Q How about now Deputy Chief Glampe, was then</p> <p>17 the IA supervisor?</p> <p>18 A Not that I recall, sir.</p> <p>19 Q How about the depo testimony of Erick Fors?</p> <p>20 A Not that I recall, sir, no.</p> <p>21 Q How about the depo testimony of Sergeant</p> <p>22 Jason Case?</p> <p>23 That's the Jason.</p> <p>24 A Not that I recall, sir.</p> <p>25 Erick Fors, I cite some of the interviews,</p> | <p style="text-align: right;">76</p> <p>1 of that water while we're...</p> <p>2 MR. BENNETT: Sure. Let's go off the record.</p> <p>3 VIDEOGRAPHER: Off the video record at</p> <p>4 10:33 a.m.</p> <p>5 (Off the record.)</p> <p>6 VIDEOGRAPHER: We are back on the video</p> <p>7 record at 10:33 a.m.</p> <p>8 BY MR. BENNETT:</p> <p>9 Q Did you look at any of the depositions as</p> <p>10 well?</p> <p>11 A Look at the video of them?</p> <p>12 Q Yeah.</p> <p>13 A No, sir.</p> <p>14 Q You just read them?</p> <p>15 A Yes, sir.</p> <p>16 Q Let me show you this one.</p> <p>17 (Video clip shown of the following questions</p> <p>18 and answers from the October 5, 2012 testimony of</p> <p>19 Deputy Chief Janee Harteau:</p> <p>20 "Well, I did. I asked on page 39, 'Well, was</p> <p>21 David Smith a subject who was not adequately controlled</p> <p>22 by handcuffing?'</p> <p>23 "Answer: No. I would say that once we had</p> <p>24 him handcuffed, we had him --</p> <p>25 "Adequately controlled?"</p> |
| <p style="text-align: right;">75</p> <p>1 but not --</p> <p>2 Q Correct.</p> <p>3 A -- his depo.</p> <p>4 Q Not his dep, not his testimony.</p> <p>5 A I don't believe so, no, sir.</p> <p>6 Q How about Dr. Baker's death hierarchy or</p> <p>7 testimony, either one?</p> <p>8 A I don't believe so, no, sir.</p> <p>9 Q Do you agree with Dr. Baker's death</p> <p>10 hierarchy?</p> <p>11 MR. OSBORNE: Objection; lack of foundation.</p> <p>12 A I'm not a medical expert.</p> <p>13 BY MR. BENNETT:</p> <p>14 Q You have no reason to disagree with it?</p> <p>15 A I have no -- I read it. I don't -- I don't</p> <p>16 have a strong feeling about it.</p> <p>17 Q Okay.</p> <p>18 A I'm not a medical expert.</p> <p>19 Q Okay.</p> <p>20 It -- nevertheless, it -- how David Smith</p> <p>21 died, according to the Hennepin County medical</p> <p>22 examiner, chief medical examiner, is not in your report</p> <p>23 either, is it?</p> <p>24 A No, sir.</p> <p>25 THE WITNESS: May I trouble you for a bottle</p> | <p style="text-align: right;">77</p> <p>1 "I think so. So if --</p> <p>2 "Okay.</p> <p>3 "-- someone is adequately controlled do they</p> <p>4 need to be knelt on in a prone restraint position?</p> <p>5 "Probably not.")</p> <p>6 (End of video clip.)</p> <p>7 BY MR. BENNETT:</p> <p>8 Q Is that consistent with generally accepted --</p> <p>9 that's Chief Janee Harteau, by the way -- with</p> <p>10 generally accepted practices and procedures of properly</p> <p>11 trained and prudent law enforcement officers facing</p> <p>12 similar circumstances?</p> <p>13 A Again, we're back to what's he doing, is he</p> <p>14 merely controlling him with his knee or is he kneeling</p> <p>15 on him.</p> <p>16 Q Well, just so we're clear, you read</p> <p>17 Dr. Baker's --</p> <p>18 A Yes, sir, I did.</p> <p>19 Q Dr. Baker said he committed a homicide by</p> <p>20 kneeling on him, didn't he?</p> <p>21 A I don't recall that specifically, no, sir.</p> <p>22 Q He -- he was the agent of the mechanic -- his</p> <p>23 knee was the agent of the mechanical asphyxia. He said</p> <p>24 that, didn't he?</p> <p>25 A I don't recall that, sir.</p> |

20 (Pages 74 to 77)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p style="text-align: right;">78</p> <p>1 Q Okay.</p> <p>2 You don't recall him saying that the pressure</p> <p>3 of the knee on his -- between his scapulas caused the</p> <p>4 mechanical asphyxia?</p> <p>5 A I don't recall that specific language, no,</p> <p>6 sir, I do not.</p> <p>7 Q What do you think was the cause of the</p> <p>8 mechanical asphyxia?</p> <p>9 A I think there are a variety of factors in --</p> <p>10 in play in the death of David Smith.</p> <p>11 Q Okay.</p> <p>12 A And I believe that's what the medical</p> <p>13 examiner said.</p> <p>14 Q Well, no. He said -- he -- he died of anoxic</p> <p>15 encephalopathy caused by cardiopulmonary arrest,</p> <p>16 resuscitated, caused by mechanical asphyxia. Isn't</p> <p>17 that right? That's what Exhibit 5 says. Or excuse me,</p> <p>18 Exhibit 4.</p> <p>19 The actual due to or as a cause of is, in</p> <p>20 reverse hierarchical order, anoxic encephalopathy,</p> <p>21 cardiopulmonary arrest, resuscitated, due to or as a</p> <p>22 consequence of mechanical asphyxia. Correct?</p> <p>23 A I don't see the statement about reverse</p> <p>24 hierarchy of order. I see a cause of death hierarchy</p> <p>25 report, and then...</p> | <p style="text-align: right;">80</p> <p>1 I don't recall specifically his words, no, sir.</p> <p>2 Q And these other things may or may not have</p> <p>3 anything to do with the death itself, correct?</p> <p>4 A Well, it says "other significant conditions."</p> <p>5 Q Well, I know. But let's say you were -- you</p> <p>6 fell into the orca tank at Sea World and you were a</p> <p>7 woman. Now, the orca bit you in half, okay? But if</p> <p>8 you get stage four breast cancer, they'd list that in</p> <p>9 "other significant conditions." Do you understand</p> <p>10 that?</p> <p>11 A I don't know that to be the practice. But...</p> <p>12 Q All right.</p> <p>13 (Reporter's Note: Sotto voce communication</p> <p>14 between Mr. Bennett and Mr. Storms.)</p> <p>15 MR. BENNETT: Let's go off the record for a</p> <p>16 second.</p> <p>17 VIDEOGRAPHER: Off the video record at</p> <p>18 10:38 a.m.</p> <p>19 (Off the record.)</p> <p>20 VIDEOGRAPHER: We are back on the video</p> <p>21 record at 10:41 a.m.</p> <p>22 BY MR. BENNETT:</p> <p>23 Q The following questions and answers were</p> <p>24 given by Dr. Baker.</p> <p>25 He was asked, "How was the mechanical force</p> |
| <p style="text-align: right;">79</p> <p>1 Q Well, the testimony was it's a reverse</p> <p>2 hierarchy. Do you remember that?</p> <p>3 A Sir, I'm responding to your question. And</p> <p>4 you used the word "reverse hierarchy" and you're</p> <p>5 pointing at a report. It's not there.</p> <p>6 Q Okay.</p> <p>7 A It says, "Cause of Death Hierarchy Report."</p> <p>8 So my -- I absolutely see what you're --</p> <p>9 Q Do you understand --</p> <p>10 A These specific words.</p> <p>11 Q You understand what a reverse hierarchy is?</p> <p>12 A Reverse, you'd flip these.</p> <p>13 Q No. You know what anoxic encephalopathy is?</p> <p>14 A No, sir.</p> <p>15 Q Brain death. That's caused by -- it says</p> <p>16 "due to or as a consequence of (b): Cardiopulmonary</p> <p>17 arrest." It's your heart and your lungs stop working.</p> <p>18 Do you know what that -- do you understand that?</p> <p>19 A Yes, sir.</p> <p>20 Q "Due to or as a consequence of (c):</p> <p>21 Mechanical asphyxia." Do you see that?</p> <p>22 A Yes, sir.</p> <p>23 Q You don't know what Dr. Baker said was the</p> <p>24 cause of the mechanical asphyxia?</p> <p>25 A I recall reading the report, but I -- I mean,</p> | <p style="text-align: right;">81</p> <p>1 that caused the asphyxia of David Smith supplied?</p> <p>2 "Answer: From the videotapes I was able to</p> <p>3 review, it appeared to be the weight of one of the</p> <p>4 officers on Mr. Smith's back.</p> <p>5 "Just one or both?</p> <p>6 "I could only tell one from the videotape,</p> <p>7 that I could see.</p> <p>8 "And that would be the one who had his knee</p> <p>9 and -- one or both knees at varying points in time --</p> <p>10 "Yes.</p> <p>11 "-- in the middle of his back between his</p> <p>12 scapulas?</p> <p>13 "Yes."</p> <p>14 The...</p> <p>15 Did you read Dr. Baker's deposition?</p> <p>16 A Yes, sir, I did.</p> <p>17 Q So you would have read that?</p> <p>18 A At some point in time, yes, sir.</p> <p>19 Q Did you also read the fact that, "If, once he</p> <p>20 had been handcuffed, had the officers not remained on</p> <p>21 top of the subject, and the subject had been turned on</p> <p>22 his side or in an upright position of comfort, he would</p> <p>23 not have died of mechanical asphyxia?</p> <p>24 "Answer: No, he would not have died of</p> <p>25 mechanical asphyxia."</p> |

21 (Pages 78 to 81)

Michael Berkow
2/25/2013

| | |
|--|---|
| <p style="text-align: right;">82</p> <p>1 Do you remember that question and that 2 answer? 3 A No, sir, I don't recall that. 4 Q Okay. Thank you. 5 MR. BENNETT: Give me volume two as well. 6 A Sorry, and your question to me now, sir? 7 Because it's -- there's quite a bit of back-and-forth 8 about that issue. 9 BY MR. BENNETT: 10 Q Well, no, there isn't. 11 I read the question correctly, didn't I? 12 A May I have -- may I have the statement, sir? 13 Q Yes. 14 A Because it starts, you ask the question, "Let 15 me ask..." If you want me to read the one sentence 16 that you're pointing to -- 17 Q Yeah. 18 A -- then I can say yes, that's what the 19 transcript says. 20 Q Okay. 21 A But just prior to that you said, "Let me ask 22 you. If once David Smith had been handcuffed, had he 23 been turned on his side or in an upright position, 24 would he have died? 25 "Answer: He might have."</p> | <p style="text-align: right;">84</p> <p>1 on -- from Coricidin overdose; isn't that correct? 2 A I recall a lot of discussion about those 3 various drugs. I don't recall the exact details. 4 Q And then discussing his high level of 5 dextromethorphan, he says -- I asked him, "You can't 6 tell me that it contributed at all to his death, can 7 you, to a reasonable degree of medical certainty?" 8 Answer: "No." 9 Do you see that? 10 A I see those specific lines that you're 11 pointing out to me in the deposition, yes, sir. 12 Q All right. 13 Now, you wanted to make sure I put everything 14 in with Dr. Baker, right? You wanted me to -- you 15 wanted to add things from that. You didn't put in the 16 compliance, resistance, or -- or giving up in your 17 report about David Smith, correct, Exhibit 1? 18 A No, that's not correct. 19 Q Where is -- where do the words that he 20 complied, was not resisting, was giving up, in your 21 report? Point them out to me. 22 A You didn't ask me if I used those specific 23 words. If I -- I don't know if I used those specific 24 words. 25 Q I do.</p> |
| <p style="text-align: right;">83</p> <p>1 MR. BENNETT: Okay. 2 I'll ask that it be stricken. It's not 3 responsive. 4 MR. OSBORNE: You don't actually strike 5 things from the record, do you? Okay. 6 MR. BENNETT: No, not -- she doesn't. 7 BY MR. BENNETT: 8 Q And just to be clear, he says, "I don't want 9 to endorse that he would have died of some other 10 unknown cause. He has another lethal condition going 11 on that he could have died for -- from." Do you see 12 that? 13 A Yes, sir, I do. 14 Q And then he goes on to answer that, that he 15 could not tell us to a reasonable degree of medical 16 certainty whether or not he would have expired in 2010 17 from dextromethorphan or chlorpheniramine intoxication 18 at all, correct? Correct. 19 You read that, too, didn't you? 20 A At some point in time I read his entire 21 deposition, yes, sir. 22 Q In fact, he's never had anybody that he knows 23 of die of -- he's never encountered anybody in his 24 career who's died of dextromethorphan or 25 chlorpheniramine intoxication, nor anyone who's died</p> | <p style="text-align: right;">85</p> <p>1 A But I certainly -- 2 Q You didn't. 3 MR. OSBORNE: Let him -- let him finish. 4 BY MR. BENNETT: 5 Q Do you want to look? Go ahead and look. 6 A I'm sorry, is there a question there, sir? 7 Q Did you use those specific words? 8 A Um... 9 Q Did you say -- 10 A Give me the specific words. 11 Q Did you ever say that Officer Callahan 12 believed he was complying and giving up, David Smith? 13 A Those specific words? 14 Q Yeah. 15 A No, sir. 16 Q Okay. 17 So you understand that Dr. Baker felt that 18 the agent of the mechanical asphyxia was one knee or 19 both knees of -- of Officer Gorman, correct? 20 A I understand that we read a line or two from 21 his deposition that said that, yes, sir. 22 Q You read his whole deposition. 23 A And I don't recall his entire deposition as I 24 sit here, sir. 25 Q Isn't that what he said? Wasn't that his</p> |

22 (Pages 82 to 85)

Michael Berkow
2/25/2013

| | |
|---|---|
| <p>86</p> <p>1 conclusion to a reasonable degree of medical certainty?</p> <p>2 A I don't recall that, sir.</p> <p>3 Q I'll read you the following question and</p> <p>4 answer. This is to Dr. Baker, volume two of his</p> <p>5 deposition.</p> <p>6 "And if both officers testified that Officer</p> <p>7 Gorman, that is the officer with the knee or knees</p> <p>8 placed between the scapulae of David Cornelius Smith,</p> <p>9 kept that position with one or both knees for a period</p> <p>10 of four and one half minutes, that would be consistent</p> <p>11 with your view of the video evidence?</p> <p>12 "Answer: Yes.</p> <p>13 "And that is the particular evidence of the</p> <p>14 mechanical asphyxia that you rely on to come to your</p> <p>15 judgment to a reasonable degree of medical certainty?</p> <p>16 "Answer: Yes."</p> <p>17 Do you understand that to be his conclusion?</p> <p>18 A I understand what you just read me, yes, sir.</p> <p>19 Q Okay.</p> <p>20 Now, you read the depositions of -- of Amelia</p> <p>21 Huffman and Lieutenant Zimmerman as well, right?</p> <p>22 A I believe so, yes, sir.</p> <p>23 Q Let me ask you this. Let's just take you</p> <p>24 through this. Let's talk about the duty to monitor a</p> <p>25 subject's medical condition.</p> | <p>88</p> <p>1 obligations under the Fourth Amendment, correct?</p> <p>2 "Correct.</p> <p>3 "Okay.")</p> <p>4 (End of video clip.)</p> <p>5 BY MR. BENNETT:</p> <p>6 Q Is that statement by Sergeant Anderson</p> <p>7 consistent with generally accepted practices and</p> <p>8 procedures of properly trained and prudent law</p> <p>9 enforcement officers?</p> <p>10 A Which statement? There was like four</p> <p>11 questions.</p> <p>12 Q Was there anything that wasn't consistent in</p> <p>13 those statements?</p> <p>14 A I don't believe so, no.</p> <p>15 Q Okay.</p> <p>16 (Video clip shown of the following questions</p> <p>17 and answers from the October 2, 2012 testimony of</p> <p>18 Sergeant Brian Anderson:</p> <p>19 "And it's a little... in some sense it's</p> <p>20 superfluous or redundant, I guess, that you need to</p> <p>21 monitor the medical condition of someone post-Tasing</p> <p>22 because the policy was already requiring officers to</p> <p>23 monitor the medical condition of a subject after any</p> <p>24 force?</p> <p>25 "Correct.</p> |
| <p>87</p> <p>1 This is Sergeant Brian Anderson.</p> <p>2 (Video clip shown of the following questions</p> <p>3 and answers from the October 2, 2012 testimony of</p> <p>4 Sergeant Brian Anderson:</p> <p>5 "And aside from just the Tasing, I guess we</p> <p>6 can back up to section 5-306. Now, here it states</p> <p>7 that, 'Any sworn MPD employee that uses force shall</p> <p>8 comply with the following requirements.' And the first</p> <p>9 it lists is medical assistance, and states, 'As soon as</p> <p>10 reasonably practical, determine if anyone was injured</p> <p>11 and render medical aid consistent with training and</p> <p>12 request emergency medical service if necessary,</p> <p>13 correct?</p> <p>14 "Correct.</p> <p>15 "So this policy works similar to the TASER</p> <p>16 policy we discussed, in that after you use some level</p> <p>17 of force, the first thing you want to do as soon as</p> <p>18 it's reasonably practical is monitor the medical</p> <p>19 condition of the subject you used force on?</p> <p>20 "Correct.</p> <p>21 "Okay. And that's been standard training</p> <p>22 since well before September 2010?</p> <p>23 "Correct.</p> <p>24 "The need to monitor the medical condition,</p> <p>25 as set forth in this policy, reflects the officer's</p> | <p>89</p> <p>1 "Okay. And in terms of monitoring the</p> <p>2 medical condition of a subject, and I think we touched</p> <p>3 on it briefly, things that officers were trained prior</p> <p>4 to 2010 to observe would be is the subject breathing?</p> <p>5 "Correct.</p> <p>6 "Are they conscious?</p> <p>7 "Correct.</p> <p>8 "Do they have any other life-threatening</p> <p>9 injuries?</p> <p>10 "Correct."</p> <p>11 (End of video clip.)</p> <p>12 BY MR. BENNETT:</p> <p>13 Q All of that is consistent with generally</p> <p>14 accepted practices and procedures of properly trained</p> <p>15 and prudent law enforcement officers, correct?</p> <p>16 A Yes. In general I would agree with all of</p> <p>17 that, sir.</p> <p>18 Q Okay.</p> <p>19 (Video clip shown of the following questions</p> <p>20 and answers from the October 2, 2012 testimony of</p> <p>21 Sergeant Brian Anderson:</p> <p>22 "It goes on to say, 'Once a subject is</p> <p>23 secured, an officer shall watch for any of the</p> <p>24 following signs: Significant change in behavior or</p> <p>25 level of consciousness, shortness of breath or</p> |

23 (Pages 86 to 89)

Michael Berkow
2/25/2013

| 90 | 92 |
|---|---|
| <p>1 irregular breathing, seizures or convulsions, 2 complaints of serious pain or injury, and/or any other 3 serious medical problem.' Do you see that? 4 "Yes. 5 "Now, this -- at a certain level, this 6 mirrors the use-of-force policy itself which says you 7 need to monitor the medical condition of the subject? 8 "Correct." 9 (End of video clip.) 10 BY MR. BENNETT: 11 Q And is that all consistent with generally 12 accepted practices and procedures of properly trained 13 and prudent law enforcement officers? 14 A Well, he's reading from a document, and I 15 don't know what the document is. 16 Q Well, does it or does it not? 17 A I can't answer the question, because he's 18 reading from a specific document and the questions were 19 about that document and I don't know what that document 20 is. 21 Q All right. 22 A He's being asked questions about a specific 23 document that -- 24 Q Well, did they -- did the principles appear 25 to be consistent with generally accepted practices and</p> | <p>1 and lay hands on from the time you do so until the time 2 you turn them over to either the jail or the medical 3 personnel, correct? 4 "Correct. 5 "You have been taught in your training that 6 if a person -- that -- well, there are a number of 7 situations you've been taught or trained to turn an 8 arrestee on their side or to set them up -- sit them 9 up, correct? 10 "Correct. 11 "One of them, oddly enough, is the excited 12 delirium situation. You actually have training on 13 that, right? 14 "Correct. 15 "And you're trained that if there's any -- 16 you're supposed to pay attention if there's any of 17 those myriad of things that you list for potential 18 excited delirium; that you're to watch the breathing 19 and if there's any compromise at all, you turn them on 20 their side or sit them up so that you get them 21 breathing, correct? 22 "That sounds accurate. 23 "That's also true with regard to really any 24 time that you have a person restrained in a prone 25 restraint and you notice any compromise of breathing.</p> |
| 91 | 93 |
| <p>1 procedures of a properly trained and prudent law 2 enforcement -- 3 A The principles that we discussed earlier 4 about medically monitoring someone -- 5 Q Yes. 6 A -- to make sure that they were -- 7 Do you want me to answer or not, sir? 8 Q Yeah, go ahead. 9 A Whether or not they're breathing -- breathing 10 or bleeding, absolutely, yes, sir. 11 Q I'm going to show you, this is Detective 12 Fors. 13 (Video clip shown of the following questions 14 and answers from the May 10, 2012 testimony of 15 Detective Erick Fors: 16 "Somebody you take -- you lay hands on and 17 you use force on them, you have to monitor their 18 consciousness, correct? 19 "Correct. 20 "You have to monitor their -- their 21 breathing; in other words, they can't -- you don't want 22 them to stop breathing or have a compromise in their 23 breathing, do you? 24 "Correct. 25 "You're responsible for the people you seize</p> | <p>1 That's what you're supposed to do? That's the 2 response? 3 "I -- I would agree with you. 4 "The other thing is you're supposed to pay 5 attention to the person you're continuing to use force 6 on to determine if they're losing consciousness or 7 having trouble breathing? 8 "Correct. 9 "So you can't really -- you know, you don't 10 want to talk about the weather. You don't want to, you 11 know, try to figure your golf score in reverse order 12 from the holes you played. You don't want to -- you 13 want to pay attention to the -- to the very serious 14 business of -- of using force on people, which is 15 something that we license police officers to do, 16 correct? 17 "Yes, you should be aware.") 18 (End of video clip.) 19 BY MR. BENNETT: 20 Q Anything about Detective Fors' testimony that 21 you disagree with? 22 A Well, you played me a fairly long snippet 23 there. There's a number of places where if you had 24 stopped it, I would say absolutely there are some 25 things that -- the excited delirium and the discussion</p> |

24 (Pages 90 to 93)

Michael Berkow
2/25/2013

| | |
|---|--|
| 94 | 96 |
| <p>1 about moving someone is a little more problematic. But</p> <p>2 absolutely in terms of the broad, general concepts of</p> <p>3 monitoring someone, making sure that they are</p> <p>4 breathing, being responsible for the people that you</p> <p>5 have in custody, yes.</p> <p>6 Q You read Adam Grobove -- he's actually a</p> <p>7 trainer who trained Callahan and Gorman. Do you</p> <p>8 remember reading that?</p> <p>9 A Vaguely, yes, sir.</p> <p>10 MR. BENNETT: This is Grobove:</p> <p>11 (Video clip shown of the following questions</p> <p>12 and answers from the August 13, 2012 testimony of</p> <p>13 Officer Adam Grobove:</p> <p>14 "And they'd be trained that once you have a</p> <p>15 subject secured, an officer shall watch for any of the</p> <p>16 following signs, including significant change in</p> <p>17 behavior or level of consciousness?</p> <p>18 "Yes, those are behaviors.</p> <p>19 "Shortness of breath, irregular breathing or</p> <p>20 not breathing?</p> <p>21 "Yes.</p> <p>22 "Seizures, convulsions?</p> <p>23 "Yes.</p> <p>24 "Complaints of any other serious pain or</p> <p>25 injury and any other serious medical problem, right?</p> | <p>1 Fourth Amendment to, for example, continue -- to</p> <p>2 continue monitoring the breathing of a suspect that</p> <p>3 they've arrested?</p> <p>4 "Yes.</p> <p>5 "That didn't happen in this case?</p> <p>6 "No. There was a significant gap of time in</p> <p>7 which that did not happen.")</p> <p>8 (End of video clip.)</p> <p>9 BY MR. BENNETT:</p> <p>10 Q Do you disagree with anything that Captain</p> <p>11 Huffman said?</p> <p>12 A About the -- except for the last sentence, I</p> <p>13 agree with everything she said. I don't agree with her</p> <p>14 last sentence.</p> <p>15 Q And why not?</p> <p>16 A Because I believe that they were talking to</p> <p>17 him, engaged with him while they were with him. They</p> <p>18 may not have been perfectly attentive to him, but they</p> <p>19 were attenant (sic) to him to some degree.</p> <p>20 Q Well, they never got any response from him.</p> <p>21 A They never got a response from him the entire</p> <p>22 time they interacted with him, yes, sir, that's</p> <p>23 correct.</p> <p>24 Q After the agonal breathing, could you hear</p> <p>25 any sounds from him?</p> |
| 95 | 97 |
| <p>1 "Yes.</p> <p>2 "I mean, you're basically --</p> <p>3 "It's medical monitoring.</p> <p>4 -- supposed to medically monitor the person</p> <p>5 you're arresting?</p> <p>6 "Yes.")</p> <p>7 (End of video clip.)</p> <p>8 BY MR. BENNETT:</p> <p>9 Q And the trainer who trained Gorman and</p> <p>10 Callahan used the term "medically monitoring," didn't</p> <p>11 he?</p> <p>12 A He did.</p> <p>13 Q And this is Captain Huffman. This gets --</p> <p>14 (Video clip shown of the following questions</p> <p>15 and answers from the July 31, 2012 testimony of Captain</p> <p>16 Amelia Huffman:</p> <p>17 "And similarly, officers have an obligation</p> <p>18 under the Fourth Amendment when they -- when they</p> <p>19 arrest someone or otherwise maintain someone in</p> <p>20 custody, they have an obligation to ensure that that</p> <p>21 person remains in good health?</p> <p>22 "Yes.</p> <p>23 "Continues to breathe?</p> <p>24 "Yes.</p> <p>25 "And so officers have an obligation under the</p> | <p>1 A I'm not familiar with the term "agonal</p> <p>2 breathing," except when you've used it in this case,</p> <p>3 sir.</p> <p>4 Q Well, after the second moaning or groaning,</p> <p>5 whatever, the -- what -- what Dr. Baker called agonal</p> <p>6 breathing or sonorous breathing. Do you know what I'm</p> <p>7 talking about, on the tape?</p> <p>8 A I understand when you say "groaning," yes.</p> <p>9 Q Did you hear any sounds from him after that</p> <p>10 time?</p> <p>11 A I don't believe so, no, sir.</p> <p>12 Q And that was at the -- at the 2:45 minute</p> <p>13 mark after the start of the first TASER cycle.</p> <p>14 A Well, which clock are you using? Because</p> <p>15 there's multiple clocks --</p> <p>16 Q Well, I'm using Dr. Baker's PowerPoint. He</p> <p>17 starts at the end -- at the first TASER cycle. He's</p> <p>18 handcuffed at -- at, according to Dr. Baker -- the last</p> <p>19 TASER cycle ends at 50 seconds. By 54 seconds he's</p> <p>20 handcuffed. Baker says his last voluntary sound is at</p> <p>21 a minute 46. Do you see that?</p> <p>22 A I -- I -- you've got it upside down there.</p> <p>23 Q I'm sorry.</p> <p>24 A That's all right.</p> <p>25 Q Don't mind me. I'm not trying to --</p> |

Michael Berkow
2/25/2013

| | |
|---|---|
| <p>98</p> <p>1 A I didn't think you were, sir.</p> <p>2 Q -- intimidate you or do anything to -- not</p> <p>3 that I could, but the...</p> <p>4 And he says the sonorous breathing or what he</p> <p>5 says agonal breathing, or the death rattle, for</p> <p>6 laypeople, starts at 2:14 and ends at 2:45. Do you see</p> <p>7 that?</p> <p>8 A If you're talking about the groaning, yes,</p> <p>9 sir.</p> <p>10 Q I'm -- he has the knee still on the back at</p> <p>11 4:48, for another two minutes after the sonorous</p> <p>12 breathing ends, correct?</p> <p>13 A Yes, sir.</p> <p>14 Q And he doesn't have the CPR started for</p> <p>15 almost four minutes after that, correct?</p> <p>16 A Yes, sir. Yes, sir.</p> <p>17 Q Do you have any disagreement with those</p> <p>18 times?</p> <p>19 A No, sir.</p> <p>20 Q Okay.</p> <p>21 Did they ever get a response from David Smith</p> <p>22 in all their discussion with him?</p> <p>23 A A verbal response? No, sir.</p> <p>24 Q Well, did they get any response?</p> <p>25 A Well, there's different sounds that he makes</p> | <p>100</p> <p>1 took a shot at it. And -- like, for example, I think</p> <p>2 one that -- for instance, Gorman testified in the</p> <p>3 second deposition after hearing this, he said, "Never</p> <p>4 get the drugs out on time." The word "drugs" is not</p> <p>5 correct. It was "never get the gloves out on time."</p> <p>6 A Yes, sir.</p> <p>7 Q Do you remember reading that?</p> <p>8 A Yes, sir.</p> <p>9 Q Okay.</p> <p>10 A I remember some conversation somewhere about</p> <p>11 that, yes, sir.</p> <p>12 Q But it was -- it was, you know, they</p> <p>13 oftentimes put gloves on if they're going to -- they</p> <p>14 know they're going to deal with people, and you see</p> <p>15 them -- did you watch all the pen camera videos?</p> <p>16 A I've watched pen camera videos. Whether</p> <p>17 they're all of them, I don't know, sir.</p> <p>18 Q Did you watch -- did you get a video -- did</p> <p>19 you get a disk with a number of pen camera videos on</p> <p>20 it?</p> <p>21 A That I don't recall.</p> <p>22 MR. OSBORNE: I don't think I sent those to</p> <p>23 Michael.</p> <p>24 BY MR. BENNETT:</p> <p>25 Q Okay. So you haven't seen the other</p> |
| <p>99</p> <p>1 and there's different movements that he makes at</p> <p>2 different times.</p> <p>3 Q Is there any movement after sonorous</p> <p>4 breathing ends?</p> <p>5 A I really don't recall when the movements stop</p> <p>6 and start. It's a little difficult to determine.</p> <p>7 Q The last -- you understand what Exhibit 30</p> <p>8 is? Do you know what that is?</p> <p>9 A I believe this is a little matrix that was</p> <p>10 put together, yes, sir.</p> <p>11 Q It says, "Timeline of Events. Pen Camera</p> <p>12 Video"?</p> <p>13 A Yes, sir.</p> <p>14 Q It has the MPD case control number on it?</p> <p>15 A Where is that?</p> <p>16 Oh, yes. Yes, sir.</p> <p>17 Q I mean, just to reference it to this case.</p> <p>18 A Yeah. No, I understand. I just didn't -- I</p> <p>19 didn't see it.</p> <p>20 Q Do you know who did this?</p> <p>21 A I think it was done by an Internal Affairs --</p> <p>22 is it -- might be Sergeant Case.</p> <p>23 Q Correct.</p> <p>24 A Is that right?</p> <p>25 Q And he didn't get all the words right, but he</p> | <p>101</p> <p>1 instances in which the pen camera was used?</p> <p>2 A I've read deposition testimony about it.</p> <p>3 Q Okay.</p> <p>4 A But I've not -- I don't believe I've seen</p> <p>5 those videos, no, sir.</p> <p>6 Q Okay. Well, you -- you can imagine that they</p> <p>7 go to a call; if they know they've got to deal with</p> <p>8 someone hands-on, a lot of times they'll put on gloves.</p> <p>9 That's not uncommon, correct?</p> <p>10 A Talking about latex gloves or like black</p> <p>11 leather or Kevlar?</p> <p>12 Q Actually, Gorman seems to put on latex and --</p> <p>13 and Callahan seems to put on leather gloves, if I</p> <p>14 remember right.</p> <p>15 MR. OSBORNE: Yeah, but I think that's --</p> <p>16 A There are certainly issues about putting on</p> <p>17 gloves and what departments allow, and...</p> <p>18 A number of departments are -- don't approve</p> <p>19 of the black leather gloves.</p> <p>20 BY MR. BENNETT:</p> <p>21 Q Okay. The...</p> <p>22 But there's a lot of discussion in this</p> <p>23 period, including the period when the groaning starts</p> <p>24 and the groaning stops, right? You know, "Never get</p> <p>25 the gloves out on time. I can't believe he punched me</p> |

26 (Pages 98 to 101)

Michael Berkow
2/25/2013

| | |
|--|--|
| <p style="text-align: right;">102</p> <p>1 in the face. I got that all on here," and he taps the 2 video. Do you remember seeing that? 3 A Yes, sir, I do. 4 Q "Can we charge him with assault 4?" And then 5 they say, "Dave, what are you doing? What are you on? 6 Dave? Dave? Dave? Come on, man. Or what are you on, 7 man? Dave?" 8 And there's -- you know, so there's 9 discussion. They never get any response to any 10 questions, right? 11 A No, sir, they do not. 12 Q So if you don't get a response, shouldn't you 13 be worried? If you ask questions, you get nothing? 14 A Well, they -- they never got an answer from 15 him the whole time they asked him questions. 16 Q Well, it doesn't mean you can -- if you don't 17 get an answer, it doesn't mean you can stop medically 18 monitoring, does it? 19 A You -- they're still engaged with him, 20 they're still with him, they're still looking at him. 21 Q Well, they didn't notice him die, did they? 22 And that's really what happened. 23 A They did not notice that there came a point 24 in time when he stopped breathing, immediately. They 25 did notice it and then they immediately started CPR.</p> | <p style="text-align: right;">104</p> <p>1 Right? 2 A Yes, sir. 3 Q And they don't start chest compressions 4 until -- from -- for 45 seconds after he says, "Gorman. 5 Gorman. Dude. I don't think he's breathing." 6 A Yes, sir, that's correct. 7 Q Okay. 8 When you're not breathing, 45 seconds is not 9 immediately, is it? 10 A I don't know how to answer that. I mean, if 11 you're not breathing, you want someone to assist you 12 immediately. 13 Q Yeah. Because you got how many minutes 14 before you go brain dead, before you have brain damage? 15 About four? 16 A I knew that once upon a time. I'm not sure 17 I've studied that in a long time. 18 Q I'm going to talk to you about -- this is the 19 head of detectives. 20 (Video clip shown of the following questions 21 and answers from the July 31, 2012 testimony of 22 Lieutenant Richard Zimmerman: 23 "As a homicide investigator and then, you 24 know, obviously now as a lieutenant, do you have the 25 ability to point out any policy violations that you</p> |
| <p style="text-align: right;">103</p> <p>1 But there was a period -- 2 Q Well, they didn't even do that. That isn't 3 fair, is it? They took his pulse. How much time 4 elapsed between the -- he says Gorman -- Gorman goes... 5 "Gorman. Gorman. I don't think he's 6 breathing." That's at eight -- at the 8-minute mark, 7 according to Exhibit 30. 8 A Yes, sir. 9 Q And they don't start CPR -- 10 A Well, they're doing other things here, aren't 11 they? I -- he's checking his pulse at that point in 12 time. 13 Q But he waits 44 seconds. I mean -- 14 A He waits 44 seconds for what? He's checking 15 his pulse in that time. 16 Q He already had no pulse. 17 A Well -- 18 Q Here's where the no pulse is. 19 He -- you -- where he checks his pulse, you 20 can see that. You can't -- he didn't check the pulse 21 once he turns him over. 22 A I believe it says right here, "I ain't got no 23 pulse." 24 Q Okay. And that's at 8:27 he's having this 25 discussion. And that's where Gorman goes, "Hmmm."</p> | <p style="text-align: right;">105</p> <p>1 observe to someone in Internal Affairs? 2 "Yes. I have a duty to report policy 3 violations. Yeah. 4 "Okay. And is that something you've done 5 before? 6 "Yes. 7 "Okay. Did you observe any policy violations 8 in this case? 9 "Um... I may have, yes. 10 "And what policy violations do you believe 11 you may have observed in this case? 12 "The duty to render -- you know, to render 13 aid right away. 14 "Did you express concern about that to 15 anyone? 16 "No. 17 "And if you have a duty to do so, why is it 18 that you didn't express concern about that to anyone? 19 "Because IA was down there, too, and 20 investigated alongside of Homicide. 21 "And so are you saying that you believe that 22 any policy violation is something that should have been 23 observed by them? 24 "Yes. 25 "Okay. And it was a policy violation that</p> |

27 (Pages 102 to 105)

Michael Berkow
2/25/2013

| | | | |
|-----|---|-----|---|
| 106 | <p>1 was obvious to you?</p> <p>2 "Yeah.")</p> <p>3 (End of video clip.)</p> <p>4 BY MR. BENNETT:</p> <p>5 Q Do you disagree with Lieutenant Zimmerman?</p> <p>6 A Yes, sir.</p> <p>7 Q Okay.</p> <p>8 Lieutenant Zimmerman took some time before he</p> <p>9 answered those questions, too, didn't he?</p> <p>10 A Yes, sir, he did, at least the one. One</p> <p>11 question he did.</p> <p>12 Q There are specific training about -- that MPD</p> <p>13 gives to monitor the handcuffed subjects in the prone</p> <p>14 position; isn't that true?</p> <p>15 A I don't recall. It might have been in the</p> <p>16 training material.</p> <p>17 Q Well, here's the training officer.</p> <p>18 (Video clip shown of the following questions</p> <p>19 and answers from the October 2, 2012 testimony of</p> <p>20 Sergeant Brian Anderson:</p> <p>21 "If MPD officers were maintaining someone in</p> <p>22 a prone position, though, in terms of training prior to</p> <p>23 2010, they would have been trained that you want to</p> <p>24 overall pay attention to the medical condition of the</p> <p>25 subject?</p> | 108 | <p>1 BY MR. BENNETT:</p> <p>2 Q Do you agree with those -- with that?</p> <p>3 A Yes, sir.</p> <p>4 Q And then here's --</p> <p>5 (Video clip shown of the following questions</p> <p>6 and answers from the May 10, 2012 testimony of</p> <p>7 Detective Erick Fors:</p> <p>8 "You believe, if, as Gorman admits, he was</p> <p>9 on -- applying pressure with one or both knees or</p> <p>10 alternatively applying pressure with the left or right</p> <p>11 knee for a period of four and a half minutes, you would</p> <p>12 expect him to pay attention for those four and a half</p> <p>13 minutes, don't you?</p> <p>14 "Yes.</p> <p>15 "And the attention is to be directed on the</p> <p>16 person you're using the force on?</p> <p>17 "Correct.</p> <p>18 "And the reason you do that is that you don't</p> <p>19 want someone to die by mistake while you're holding</p> <p>20 onto them, do you?</p> <p>21 "I think you could encompass it into a wider</p> <p>22 range: If you don't want the person to suffer any</p> <p>23 medical problems.</p> <p>24 "That's right."</p> <p>25 MR. BENNETT: And --</p> |
| 107 | <p>1 "Correct.</p> <p>2 "Because you would want to do that after any</p> <p>3 use of force anyway?</p> <p>4 "Correct.</p> <p>5 "And handcuffing someone and putting them in</p> <p>6 a prone position is obviously a use of force?</p> <p>7 "Correct.</p> <p>8 "Okay.")</p> <p>9 (End of video clip.)</p> <p>10 BY MR. BENNETT:</p> <p>11 Q Do you agree with those statements?</p> <p>12 A Yes, sir.</p> <p>13 (Video clip shown of the following questions</p> <p>14 and answers from the October 2, 2012 testimony of</p> <p>15 Sergeant Brian Anderson:</p> <p>16 "You would basically expect any officer</p> <p>17 working at the MPD in September of 2010, who had been</p> <p>18 there for any period of time, would have been trained</p> <p>19 that if they're holding someone in a prone restraint</p> <p>20 position, as soon as it's practical, they should be</p> <p>21 paying attention to whether or not that individual is</p> <p>22 suffering from any medical conditions?</p> <p>23 "Correct.")</p> <p>24 (End of video clip.)</p> <p>25</p> | 109 | <p>1 (Video clip continues:</p> <p>2 "...Minneapolis Police Department, that</p> <p>3 prolonged kneeling on a subject's back during a</p> <p>4 use-of-force encounter can compromise breathing,</p> <p>5 correct?</p> <p>6 "Correct.")</p> <p>7 (End of video clip.)</p> <p>8 BY MR. BENNETT:</p> <p>9 Q Do you agree with Detective Fors?</p> <p>10 A I don't know who he is. And I think we've</p> <p>11 already looked at this, sir.</p> <p>12 Q Not that one.</p> <p>13 A Okay. You show me little clips of videos,</p> <p>14 sir. It's difficult -- and you show them in a random,</p> <p>15 rapid order without telling me who is speaking first.</p> <p>16 So it's a little difficult me to keep them all</p> <p>17 straight.</p> <p>18 Q That was Detective Fors, who -- the guy who</p> <p>19 took --</p> <p>20 A The statements.</p> <p>21 Q -- the statements.</p> <p>22 A Okay. Great.</p> <p>23 I can agree with what he said up until the</p> <p>24 last question and answer.</p> <p>25 Q Okay.</p> |

Michael Berkow
2/25/2013

| | |
|--|--|
| <p>110</p> <p>1 And what do you disagree with about the last 2 question and answer? 3 A Oh, well, now you -- I'd have to -- you'd 4 have to show me that last question and answer again. 5 Q Okay. 6 MR. BENNETT: Can I move this forward to 7 the -- no? 8 (Video clip shown of the following questions 9 and answers from the May 10, 2012 testimony of 10 Detective Erick Fors: 11 "You believe, if, as Gorman admits, he was 12 on -- applying pressure with one or both knees or 13 alternatively applying pressure with the left or right 14 knee for a period of four and a half minutes, you would 15 expect him to pay attention for those four and a half 16 minutes, don't you? 17 "Yes. 18 "And the attention is to be directed on the 19 person you're using the force on? 20 "Correct. 21 "And the reason you do that is that you don't 22 want someone to die by mistake while you're holding 23 onto them, do you? 24 "I think you could encompass it into a wider 25 range: If you don't want the person to suffer any</p> | <p>112</p> <p>1 A What training? 2 Q That he just said he received. 3 A I'm not aware of what training he received, 4 sir. I don't recall what training he received. 5 Q The training that kneeling on the subject's 6 back in the prone position for four and a half minutes 7 is improper. 8 A You're saying that he received specific 9 training that -- 10 Q He said. I didn't say. I'm just saying -- 11 you say -- are you saying he didn't get the training he 12 just said? 13 A No, I'm not -- I have no opinion whether or 14 not he got the training. 15 Q Is the training that he described consistent 16 with generally accepted practices and procedures of a 17 properly trained and prudent law enforcement agency? 18 A I have no idea. I'd have to see the 19 training. 20 Q Okay. 21 And here's the training officer. 22 (Video clip shown of the following questions 23 and answers from the October 2, 2012 testimony of 24 Sergeant Brian Anderson: 25 "Prior to September 9, 2010, were MPD</p> |
| <p>111</p> <p>1 medical problems. 2 "That's right." 3 (End of video clip.) 4 BY MR. BENNETT: 5 Q And there's the last question. 6 A Right. 7 (Video clip shown of the following questions 8 and answers from the May 10, 2012 testimony of 9 Detective Erick Fors: 10 "... the Minneapolis Police Department, that 11 prolonged kneeling on a subject's back during a 12 use-of-force encounter can compromise breathing, 13 correct? 14 "Correct." 15 (End of video clip.) 16 BY MR. BENNETT: 17 Q Do you disagree with the fact that he's had 18 that training? 19 A I have no idea. I don't recall if he did or 20 he didn't. 21 Q So that isn't -- is that training that he 22 just talked about in the last answer, is that 23 consistent with generally accepted practices and 24 procedures of properly trained and prudent law 25 enforcement agencies?</p> | <p>113</p> <p>1 officers trained that it's appropriate to place a 2 subject in prone position and kneel on the subject's 3 back for several minutes without monitoring the 4 subject's level of consciousness? 5 "No. 6 "Prior to September 9, 2010, were MPD 7 officers trained that it is appropriate to place a 8 subject in the prone position and kneel on the 9 subject's back for several minutes without monitoring 10 the subject's breathing? 11 "No.") 12 (End of video clip.) 13 BY MR. BENNETT: 14 Q Do you agree with -- with training Officer 15 Brian Anderson? 16 A Well, again, he's referencing training, and 17 I'm not sure what you're referring to. And if you'll 18 recall from the video before that, you were very 19 careful, Mr. Bennett, to talk about alternately placing 20 pressure of one knee and then the other, versus here 21 where it's just referred to as "kneeling." So I have 22 difficulty just giving you a yes or no answer as to do 23 I agree with the sergeant. 24 Q So you don't -- you're not able to answer the 25 question?</p> |

29 (Pages 110 to 113)

Michael Berkow
2/25/2013

| | |
|---|---|
| <p style="text-align: right;">114</p> <p>1 A No, sir. There's a significant difference in 2 the way the questions were phrased. 3 Q Okay. This is Sergeant Anderson again. 4 (Video clip shown of the following questions 5 and answers from the October 2, 2012 testimony of 6 Sergeant Brian Anderson: 7 "So if you had a suspect who was complying 8 and was under control, the training that you provided 9 would have been at that point you want to get that 10 person in a side position or a seated position? 11 "Correct. 12 "Okay. Would you expect that all MP -- all 13 MPD officers prior to 2010 would have received training 14 to that effect? 15 "Correct. 16 "Okay." 17 (End of video clip.) 18 BY MR. BENNETT: 19 Q Is that training consistent with generally 20 accepted practices and procedures of a properly trained 21 and prudent law enforcement agency? 22 A I don't know what training he's referencing, 23 sir. I'm not -- 24 Q The training he just described. 25 A He didn't describe training, sir.</p> | <p style="text-align: right;">116</p> <p>1 person in a side position or a seated position? 2 "Correct. 3 "Okay. Would you expect that all MP -- all 4 MPD officers prior to 2010 would have received training 5 to that effect? 6 "Correct. 7 "Okay." 8 (End of video clip.) 9 BY MR. BENNETT: 10 Q What's wrong with -- what is unanswerable 11 about that question? 12 A Ask me the question, sir. You're asking -- 13 if you're asking me about the training, I'd have to see 14 the plan of training. If you're asking me about -- 15 Q I asked him about the training. He didn't 16 say I needed to show him the plan of training. 17 A I'm not testifying for him, sir. 18 Q Well, he was the -- he was the training 19 expert for the city that they put up as a Rule 20 30(b)(6). You know what that is, don't you? 21 A Yes, I do. 22 Q You're a lawyer. 23 A Yes, sir. 24 Q Okay. That means they designate someone 25 whose most knowledgeable about training, doesn't it?</p> |
| <p style="text-align: right;">115</p> <p>1 Q He did -- 2 A The question was -- the question was: Did 3 you provide training. And I -- I don't have the 4 training program, so I'd have to see what the specific 5 training was, sir. 6 Q Well, he -- he's verbally describing the 7 training. Is that the problem, you don't like his 8 verbal description of it? Do you disagree with his 9 verbal description of it? 10 A I don't know, sir. I'd have to see what the 11 specific training -- you're asking him about training 12 that was delivered to Minneapolis PD. You're 13 referencing a course of training. 14 Q Well, he is. 15 A No, sir. The question is -- the questioner 16 is asking him about a course of training. 17 Q Well, what do you disagree with the answer? 18 Is there anything you -- just watch it again, see if 19 you -- you tell me what's wrong with his answer. 20 (Video clip shown of the following questions 21 and answers from the October 2, 2012 testimony of 22 Sergeant Brian Anderson: 23 "So if you had a suspect who was complying 24 and was under control, the training that you provided 25 would have been at that point you want to get that</p> | <p style="text-align: right;">117</p> <p>1 A They designate a specific individual to speak 2 on training, yes, sir. 3 Q Well, assuming I wrote the Rule 30(b)(6) 4 Notice correctly, it would be the person who's able to 5 give the answers with the most underlying knowledge, 6 correct? 7 A And presume they pick the right person, 8 absolutely. 9 Q Is there anything about his answer you didn't 10 understand? 11 A That I didn't understand? 12 Q Yes. 13 A No. 14 Q Anything you disagreed with? 15 A He's -- his answer relates to a specific 16 course of training that he's familiar with that I'm 17 not. 18 Q Okay. But he's asking about what officers 19 should have understood from the training. Did you get 20 that from the answer? 21 A Yes, sir. 22 Q All right. Do you have any disagreement 23 with -- I mean, is that -- is that what you want 24 officers to get from that kind of training? 25 A I -- I don't know what the training was, sir.</p> |

30 (Pages 114 to 117)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p>118</p> <p>1 Q Okay. All right. 2 (Video clip shown of the following questions 3 and answers from the July 31, 2012 testimony of Captain 4 Amelia Huffman: 5 "Now, you talk about not being a doctor in 6 terms of understanding the length of time that, you 7 know, there was kneeling on David Smith's back. 8 Minneapolis police officers, along with all other 9 police officers, have been trained for a long period of 10 time that you're not supposed to continue to kneel on 11 the backs of subjects for a long period of time; isn't 12 that right? 13 "Yes. We train officers to turn them over 14 into the recovery position as soon as practical. 15 "And that was long before this case, wasn't 16 it, that that training has been provided? 17 "Yes. I don't know for how long and in -- 18 and in what context, but certainly it's been part of 19 our maximal restraint policy for many years. 20 "And it's something that you would -- that 21 you train to do not only in maximal restraint, but in 22 any situation where you have a handcuffed individual in 23 the prone position; isn't that right? 24 "Yes. We encourage officers to turn them 25 over as soon as practical onto their side.")</p> | <p>120</p> <p>1 "Your training as a Minneapolis police 2 officer tells you that you should turn a 3 prone-restrained subject on their side to assist with 4 breathing? 5 "At a certain point, yes. 6 "Well, whenever you can, the first point you 7 can? 8 "Yes. 9 "MPD policy also tells you the same thing? 10 "Correct. 11 "You believe that there may have been a 12 different outcome in this case if David Smith was put 13 on his side? 14 "There could have been, yes." 15 (End of video clip.) 16 BY MR. BENNETT: 17 Q Do you have any disagreement with Lieutenant, 18 now Deputy Chief, Glampe? 19 A Again, I believe it appears to me that the 20 questions are very broad and his answers are very 21 broad, so I would not agree with them as given. 22 Q Okay. 23 Here is Detective Zimmerman. 24 (Video clip shown of the following questions 25 and answers from the July 31, 2012 testimony of</p> |
| <p>119</p> <p>1 (End of video clip.) 2 BY MR. BENNETT: 3 Q Do you understand what that training that 4 she's describing is? 5 A No, sir. 6 Q Okay. 7 So you're unable to comment on it one way or 8 another? 9 A No, sir, I wouldn't comment on that. 10 Q Okay. Good. 11 This is Travis Glampe, the head of IA. 12 (Video clip shown of the following questions 13 and answers from the July 24, 2012 testimony of 14 Lieutenant Travis Glampe: 15 "-- restrained in a prone position in the way 16 that Callahan and Gorman did" -- 17 THE WITNESS: Can you restart it? I'm sorry, 18 you were talking to me when it started. 19 MR. BENNETT: Sure. 20 Can I just hit it again, Katie? 21 Travis Glampe, IA lieutenant: 22 ("You agree that keeping David Smith 23 restrained in a prone position in the way that Callahan 24 and Gorman did was a use of force? 25 "Yes.</p> | <p>121</p> <p>1 Lieutenant Richard Zimmerman: 2 "Did it surprise you that the cause of death 3 was mechanical asphyxia? 4 "No. 5 "And why didn't that surprise you? 6 "Because they had kneeled on him to handcuff 7 him." 8 (End of video clip.) 9 BY MR. BENNETT: 10 Q Now, I didn't use the word "kneel," and 11 neither did Mr. Storms. That was the head of -- or the 12 lieutenant in Homicide's words. Correct? 13 A Yes, sir. 14 Q Okay. 15 And he certainly understood that kneeling on 16 the subject's back could cause them to die from 17 mechanical asphyxia, couldn't he? Is that generally 18 understood in police -- in police practice? 19 A Well, we've seen "kneeling" described four 20 different ways, at least, since we've been going 21 through these videos. So I don't think I can give you 22 a clear answer to that question. 23 Q I'm sure you can't. 24 A I'm sorry, was that a question, sir? 25 Q No, that was a comment.</p> |

Michael Berkow
2/25/2013

| | |
|--|---|
| <p style="text-align: right;">122</p> <p>1 The -- I want to go through your report, ask 2 you some questions here about that. 3 Basically what was described in the details 4 of the incident was a person who was mentally ill, 5 correct? That they were -- 6 A I don't know what you're referring to, sir. 7 Q Well, I'm referring to page 7 and 8 of your 8 -- 9 "He might have been drunk, but she was unsure 10 if he was drunk, but he was nonresponsive to her 11 questions, confused." Correct? 12 A You're asking what -- I'm repeating what the 13 various witnesses said? 14 Q Well, you repeat parts of what various 15 witnesses said, to be fair. Correct? 16 A I try and lay out the facts using the various 17 witnesses that are fact witnesses. 18 Q Yeah. Okay. 19 And in fact, you cite the 911 call. It said, 20 "We have a gentleman in the building. He doesn't know 21 who he is, he doesn't know his name, he doesn't know my 22 name, and he doesn't know where he is." 23 A Yes, sir. 24 Q Page 8. 25 A Yes, sir.</p> | <p style="text-align: right;">124</p> <p>1 my jaw." 2 Q Well, there's a -- 3 A Or something like that. 4 Q -- "or else" sort of component to that, isn't 5 there? You better not have broken my jaw or what? 6 A I didn't hear a threat or -- or an "or else," 7 sir. 8 Q Okay. 9 A Not that I recall. 10 Q "I can't bite down. Motherfucker, you better 11 not have broke my fucking jaw." That's what he said, 12 right? 13 A Period. Yes, sir. 14 Q So that is just a declarative sentence, in 15 your view? That's -- 16 MR. OSBORNE: Weren't they talking right 17 around there about fourth degree assault or something 18 like that? 19 MR. BENNETT: No, not -- actually, not then. 20 This is later on, actually. This is at the 6:46 mark. 21 A They actually use "motherfucker" several 22 times, as I recall. 23 BY MR. BENNETT: 24 Q I do, too. 25 But, "You better not have broke my fucking</p> |
| <p style="text-align: right;">123</p> <p>1 Q Does that sound like someone who might be 2 having a mental illness problem? 3 A I think it could be. It could be that, could 4 be a lot of things. Yes, sir. 5 Q Sure. 6 You don't mention the four and a half minutes 7 that -- that Gorman remained on -- putting pressure 8 with one or both knees on David Smith's back, correct, 9 in your report? 10 A Um, I believe that I describe the 11 circumstances of them using force, taking him into 12 custody. I just... I'm not sure what your specific -- 13 you're asking me to -- a negative, I believe. 14 Q Well, do the -- does the words "four and a 15 half minutes" appear there, in your report? 16 A I don't believe so, no, sir. 17 Q Okay. 18 And you don't make any mention of the term 19 "motherfucker." You discuss a lot of things they talk 20 about, but you don't talk about that, right? 21 A No, sir. 22 Q You don't mention the threat about what he 23 would do to him if his jaw was broken, do you? 24 A I don't recall a threat. I recall him 25 saying, "Motherfucker, I -- you better not have broken</p> | <p style="text-align: right;">125</p> <p>1 jaw," causes me to ask, or what? Or else what? 2 MR. OSBORNE: Well, that's not on there, 3 though, Bob. 4 MR. BENNETT: No. 5 MR. OSBORNE: It's not on the videotape 6 either. 7 MR. BENNETT: No, it isn't. 8 THE WITNESS: I guess that's a comment again, 9 sir. 10 BY MR. BENNETT: 11 Q Or you'll kill me? What? I mean -- I 12 don't -- 13 A Is there a question? 14 Q You know, what is the implied -- 15 MR. OSBORNE: Could be you could be charged 16 with a crime. 17 MR. BENNETT: Okay. 18 BY MR. BENNETT: 19 Q The... 20 Was there -- do you -- do you describe any 21 overt activity to monitor consciousness or respiration 22 before he checks the pulse at 7:50, at the 7:50 mark on 23 Exhibit 30? 24 A I'm sorry, by officers -- any affirmative 25 action by the officers on the scene?</p> |

32 (Pages 122 to 125)

Michael Berkow
2/25/2013

| | |
|--|--|
| <p style="text-align: right;">126</p> <p>1 Q Yeah.</p> <p>2 A Is that what you're talking about, sir?</p> <p>3 Q Yeah.</p> <p>4 A On page 10 I believe I said both are talking</p> <p>5 to him on a fairly regular basis. They're both asking</p> <p>6 him if he's okay. They're both asking if he understood</p> <p>7 him.</p> <p>8 Q And they -- but they got -- you know, if you</p> <p>9 talk to someone who is unconscious, what kind of</p> <p>10 response are you going to get?</p> <p>11 A Nothing.</p> <p>12 Q How about the person who's dead?</p> <p>13 A Nothing.</p> <p>14 Q Okay. So not getting responses doesn't tell</p> <p>15 very -- you very much, does it?</p> <p>16 A That verbal interaction, yes, no, it doesn't</p> <p>17 tell you very much.</p> <p>18 Q So you have to do something beyond not</p> <p>19 getting responses to actually check the level of</p> <p>20 consciousness or respiration, correct?</p> <p>21 A Well, there could be other factors, sir.</p> <p>22 Q Well, you hear on the tape Gorman and</p> <p>23 Callahan breathing hard from the struggle, correct?</p> <p>24 A I hear a lot of people breathing hard. I'm</p> <p>25 not sure I can distinguish who's breathing hard.</p> | <p style="text-align: right;">128</p> <p>1 camera and the TASER camera video.</p> <p>2 A I -- I don't know exactly what he did, sir.</p> <p>3 Q Well, you read his deposition, didn't you?</p> <p>4 A Who? I'm sorry?</p> <p>5 Q Case. He's the investigator for Internal</p> <p>6 Affairs?</p> <p>7 A I'm sure I did. I don't recall the specific</p> <p>8 details of it.</p> <p>9 Q And apparently Case didn't even figure out</p> <p>10 the violation that Homicide Lieutenant Zimmerman found,</p> <p>11 correct?</p> <p>12 A I have no idea.</p> <p>13 Q Well, he didn't -- you saw what Zimmerman</p> <p>14 testified to, correct?</p> <p>15 A I just saw this -- this testimony, yes, sir.</p> <p>16 Q And you read it before, right?</p> <p>17 A May have. I'm sure I've read it, but I don't</p> <p>18 recall it.</p> <p>19 Q Okay.</p> <p>20 A There was an awful lot of material in this</p> <p>21 case.</p> <p>22 Q Did you review potential criminal statutes to</p> <p>23 see what might have been brought up to the grand jury?</p> <p>24 A No, sir.</p> <p>25 Q Now, you're not conflating the grand jury</p> |
| <p style="text-align: right;">127</p> <p>1 There's -- seems to me everybody is breathing hard at</p> <p>2 some point.</p> <p>3 Q Okay.</p> <p>4 Now, you go on on page 11 to state that the</p> <p>5 MPD conducted a bifurcated investigation.</p> <p>6 A Yes, sir.</p> <p>7 Q In fact, is that true? There was not a</p> <p>8 separate investigation onto -- on IA, was there?</p> <p>9 A Ah, I don't know. What I've seen is the --</p> <p>10 they did a voluntary statement that was in the criminal</p> <p>11 investigation that then went over into the IA</p> <p>12 investigation.</p> <p>13 Q Well, no. But the IA investigator did not</p> <p>14 take a statement under -- with a Garrity warning,</p> <p>15 correct?</p> <p>16 A No, he did not. Not that I've seen, no, sir.</p> <p>17 Q And he didn't take statement -- Sergeant Case</p> <p>18 didn't take any independent witness statements at all,</p> <p>19 did he?</p> <p>20 A When that -- that doesn't answer the question</p> <p>21 of whether or not it's bifurcated or not. But the</p> <p>22 Garrity statement certainly is a relevant factor.</p> <p>23 Q He didn't -- he didn't conduct any</p> <p>24 investigation beyond letting -- other than -- as far as</p> <p>25 I can tell, other than doing this timeline from the pen</p> | <p style="text-align: right;">129</p> <p>1 process with the Internal Affairs process, are you?</p> <p>2 They're entirely different.</p> <p>3 A I don't understand your question.</p> <p>4 Q Well, a grand jury doesn't consider Internal</p> <p>5 Affairs disciplinary actions, does it?</p> <p>6 A No.</p> <p>7 Q They're never even told about various</p> <p>8 policies of the Minneapolis Police Department, are</p> <p>9 they?</p> <p>10 A I don't know. They may or may not have been.</p> <p>11 Q All right. It's not really within their</p> <p>12 purview about whether a policy was violated. It's</p> <p>13 whether a law was violated, a criminal law of the state</p> <p>14 of Minnesota --</p> <p>15 A Correct.</p> <p>16 Q -- correct?</p> <p>17 So they're not -- they're -- they're</p> <p>18 different analyses, Internal Affairs and a grand jury?</p> <p>19 A Absolutely. Absolutely.</p> <p>20 Q And a no bill on a grand jury does not excuse</p> <p>21 the Internal Affairs and the people that supervise it</p> <p>22 and exercise disciplinary activity from the</p> <p>23 investigation from doing their job, does it?</p> <p>24 A No.</p> <p>25 Q Okay.</p> |

33 (Pages 126 to 129)

Michael Berkow
2/25/2013

| | |
|---|---|
| <p style="text-align: right;">130</p> <p>1 And you haven't read any grand jury minutes 2 or transcript, have you? 3 A No, sir. 4 Q So you don't know what was done there and 5 what wasn't done there? 6 A No idea. 7 Q And you -- did -- when you were back there 8 in -- you didn't do criminal work, it sounds like, 9 in -- at your job in Washington; is that true? 10 A I'm sorry? 11 Q Did you do criminal defense stuff or 12 prosecution in Washington? 13 A Oh, the state of Washington. Actually, yes, 14 I did, sir. 15 Q Okay. Well, then you know a little bit about 16 it. 17 You would have known that as a police 18 officer, maybe as a law clerk and -- to a federal 19 judge, but, you know, there's a -- there's an old 20 saying, at least that I've heard many times, that, you 21 know, if the U.S. attorney wants to indict someone, 22 they could indict a ham sandwich. You heard that 23 before, too? 24 A Yes, I have. 25 Q Okay. And if they don't, they don't -- they</p> | <p style="text-align: right;">132</p> <p>1 doesn't -- 2 Why don't we go off the record. 3 VIDEOGRAPHER: Off the video record at 4 11:32 a.m. 5 (Discussion held off the record.) 6 VIDEOGRAPHER: We are back on the video 7 record at 11:52 a.m. 8 BY MR. BENNETT: 9 Q I understand that you made a site visit to 10 the YMCA gym on March 12, 2012, correct? 11 A Yes, sir. 12 Q And you went with Officer Callahan and 13 Gorman, accompanied by city attorneys Burt Osborne and 14 Tracey Fussy; is that right? 15 A Yes, sir. 16 Q And you didn't allow the officer to review 17 any reports, diagram, photos or videos? 18 A Not with me, did not, no, sir. 19 Q So basically they -- you went there without 20 any firm reference to the record as it existed? 21 A Well, they were the best evidence. They were 22 the ones who did it, so -- 23 Q Well, they -- that was a year and a half ago. 24 The best evidence is the film that occurred 25 contemporaneously with it occurring. They were the --</p> |
| <p style="text-align: right;">131</p> <p>1 can get no bills pretty easily too, can't they? 2 A I've not heard that corresponding corollary. 3 Q All right. 4 The -- you didn't mention it, but it's a fact 5 that the -- that the recommendation from the 6 use-of-force review committee was that the MPD receive 7 additional training for all officers on excited 8 delirium syndrome, correct? 9 A Yes, sir. 10 Q And you understand that the medical 11 examiner's with -- of this -- the common jurisdiction 12 found that there was no excited delirium involved, 13 correct? 14 A I don't recall any mention by the medical 15 examiner of excited delirium. 16 Q Well, I think they actually ruled it out, to 17 be perfectly -- there wasn't any -- there wasn't 18 excited delirium in this case, is what Baker said. 19 I -- 20 A I don't -- I don't recall, but... 21 MR. BENNETT: Okay. 22 I want to -- let me -- let me ask you a 23 question -- 24 MR. OSBORNE: Sure. 25 MR. BENNETT: -- first. And the answer</p> | <p style="text-align: right;">133</p> <p>1 that's the best evidence, isn't it? 2 A No, that's a partial record. It's not 3 complete. It's certainly very relevant. It's 4 certainly very valuable. But it's not a total and 5 complete depiction of everything. 6 Q And you -- you had them walk through their 7 incident to the best of their recollection without any 8 reference to record evidence, correct? 9 A Yes, sir. 10 Q And so you didn't have either the Y video to 11 take you through where they had started and where they 12 ended up, right? 13 A No, sir, did not -- 14 Q Didn't have the TASER video and you didn't 15 have the pen camera video? 16 A No, sir. 17 Q All right. 18 And then you had them independently position 19 you on the floor, and they each took their respective 20 positions on you in the same manner that they had been 21 positioned on Mr. Smith. How could you tell that 22 without reference to the record? 23 A They positioned me to the best of their 24 recollection. 25 Q Well, so it's not necessarily the same</p> |

34 (Pages 130 to 133)

Michael Berkow

2/25/2013

134

1 manner. The best of their recollection is of
 2 March 12th, 2012, is what they gave you, right?
 3 **A Yes, sir.**
 4 Q And did they have you pointed the same way as
 5 Smith?
 6 **A Yes, sir.**
 7 Q All right. Now, I take it there -- there was
 8 no application of the Scientific Method in this at all,
 9 was there? Do you know what the Scientific Method is?
 10 **A Well, why don't you explain to me what you**
 11 **mean by it.**
 12 Q Why don't you tell me what the Scientific
 13 Method is as you understand it.
 14 **A I don't know what you're talking about, sir.**
 15 **"Science" could mean a whole range of things.**
 16 Q Well, there's such a thing called the
 17 Scientific Method that experts use to -- in order to
 18 make conclusions from events as if they were
 19 scientists. And you -- you were not trying to follow a
 20 Scientific Method?
 21 **A I was not trying to find a randomized control**
 22 **study or an experiment in that nature, no, sir.**
 23 Q And you understand -- have you read Chan's
 24 studies?
 25 **A At some point in time I actually have, yes,**

135

1 **sir.**
 2 Q Sure. So you know that he writes in his own
 3 reports the significant limitations of his study?
 4 **A Yes, sir.**
 5 Q But he is actually trying to use the
 6 scientific method, isn't he?
 7 **A Appears to be, yes, sir.**
 8 Q And he has to take that and run it through an
 9 institutional review board that approves
 10 experimentation -- scientific experimentation on human
 11 subjects?
 12 **A I recall a lot of that discussion in his**
 13 **deposition, yes, sir.**
 14 Q And you did not?
 15 **A No, sir.**
 16 Q And basically yours is a year-and-a-half-
 17 later anecdotal view of what happened from the officers
 18 who were involved in a critical incident?
 19 **A Yes, sir.**
 20 Q Okay.
 21 MR. OSBORNE: It would be offered for nothing
 22 more than that. I mean --
 23 MR. BENNETT: Well, yeah. Yeah, I'm going to
 24 object to it, as you know.
 25

136

1 BY MR. BENNETT:
 2 Q Obviously -- you're not psychotic, are you?
 3 **A I'm sorry?**
 4 Q You're not psychotic?
 5 **A I don't think so, no, sir.**
 6 Q They didn't Tase you five times?
 7 **A No, sir.**
 8 Q You didn't ingest 30-plus Coricidin?
 9 **A No, sir.**
 10 Q They did not engage you in a ground fight
 11 that lasted at least a minute, correct?
 12 **A No, sir.**
 13 Q The...
 14 And you knew basically that whenever you
 15 wanted them to get off your back, they'd get off your
 16 back?
 17 **A I assumed so, yes, sir.**
 18 Q Okay. So -- they didn't handcuff you?
 19 **A No, sir.**
 20 Q So you really weren't put in the prone
 21 restraint position at all, were you? You weren't
 22 restrained with your hands handcuffed behind your back?
 23 **A No, sir, I was not.**
 24 Q Okay.
 25 So you'd agree with me that what you did in

137

1 no way replicates what actually transpired in that gym
 2 on September 10, 2012, correct?
 3 **A I won't agree with you that it in no way**
 4 **replicates.**
 5 Q Well, what ways does it replicate it?
 6 **A Well, what I asked was the officers to**
 7 **position themselves as they had been relevant (sic) to**
 8 **Mr. Smith.**
 9 Q Did you double-check whether they were doing
 10 that by your viewing the videos?
 11 **A I certainly have viewed the videos and it's**
 12 **consistent with what they described and showed me.**
 13 Q On March 12th when it was occurring, did you
 14 verify that they were in fact in the positions that
 15 they were as depicted in the TASER and pen camera
 16 videos?
 17 **A No.**
 18 Q Okay.
 19 You didn't do anything to replicate the
 20 ground fight?
 21 **A No, sir.**
 22 Q Nothing to replicate the Tasings?
 23 **A No, sir.**
 24 Q Nothing to replicate the condition of the
 25 person being held down?

35 (Pages 134 to 137)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p style="text-align: right;">138</p> <p>1 A I don't understand what you mean. 2 Q Well, I mean, for example, Chan makes, at 3 least in some of his studies, makes the people engage 4 in some exercise. 5 A Yes, sir. 6 Q You didn't engage in any exercise -- 7 A No, sir. 8 Q -- before that? 9 A No, sir. 10 Q And basically you were trying to get an idea 11 of what the officers might have done on that day in 12 terms of positioning on the bodies, correct? 13 A The officers' recollection of what they did 14 relative to positioning on the bodies, yes, sir. 15 Q All right. Did you check and see if it was 16 consistent with what they told the grand jury? 17 A No. 18 Q Did you check and see if it was consistent 19 with what they said in their deposition on March 12th? 20 A On the day that I did this? 21 Q Yes. 22 A No, sir. 23 Q Okay. 24 And when you did it, you did it one officer 25 at a time; correct?</p> | <p style="text-align: right;">140</p> <p>1 As far as you know, though, you didn't do 2 anything to double-check their work -- their 3 recollection that day as being reliable and consistent 4 with the videotapes? 5 A On that day, no, sir. 6 Q All right. And you didn't videotape what 7 they did, did you? 8 A No, sir. 9 Q So we can't look at what they did? 10 A No, sir. 11 Q And we rely on your -- who was in the room 12 with you when they did it? 13 A The two city attorneys. 14 Q So basically we got two people who can't 15 really act as witnesses, if I understand the -- unless 16 they want to hire new lawyers. 17 A Well, I -- 18 Q So, I mean -- and you were facedown on the 19 ground? 20 A Correct. 21 Q Okay. 22 Now, I've heard of and actually been involved 23 in some reenactments. 24 A Yes, sir. 25 Q Okay. And the reenactments that I've been</p> |
| <p style="text-align: right;">139</p> <p>1 A Yes, sir. 2 Q Who did you do first? 3 A Callahan. 4 Q All right. And you did it so that Gorman 5 couldn't see what Callahan did and Callahan couldn't 6 see what Gorman did? 7 A That's correct. 8 Q All right. Did Gorman get in the position 9 that he was in, or did he get into the position he 10 remembered Callahan was in as well? 11 A I'm sorry. Excuse me? 12 Q Well, did -- so Gorman put a knee or both 13 knees or switched knees on your back? Did he -- which 14 knee did he use? 15 A Yes, sir. He -- that's what he did. He 16 did -- took the position that he recalled him taking 17 with Mr. Smith. 18 Q Did he hop on your -- on your back with both 19 knees? 20 A Did he hop? 21 Q Yeah. 22 A No, sir, he did not. 23 Q Did he hit you in the head? 24 A No, sir. 25 Q Okay.</p> | <p style="text-align: right;">141</p> <p>1 involved in and been involved in looking at, A, we 2 filmed them all. Have you filmed reenactments? Have 3 you ever done any as a chief? 4 A Yes, sir. 5 Q You've filmed them, haven't you? 6 A Filmed the whole reenactment? 7 Q Yeah. 8 A Um, I think in one case we may have filmed 9 the whole reenactment, but there are others where -- 10 Q You didn't? 11 A No. No, sir. 12 Q Well, if you're going to do a, quote, 13 reenactment, end quote, you want to be sure that you're 14 doing everything as close to the actual event as 15 possible, correct? 16 A Yes, sir. 17 Q All right. This was not even a reenactment, 18 was it? 19 A No, I would not call it that. 20 Q All right. 21 And the officers weren't mad at you? 22 A I'm sorry? 23 Q The officers weren't angry at you? 24 A I really don't know. 25 Q They didn't say anything -- they didn't call</p> |

36 (Pages 138 to 141)

Michael Berkow
2/25/2013

| | |
|--|---|
| <p style="text-align: right;">142</p> <p>1 you a "motherfucker," I imagine, did they?</p> <p>2 A No, they did not call me a "motherfucker."</p> <p>3 Q They didn't discuss criminal charges for you</p> <p>4 either, I would guess, did they?</p> <p>5 A I don't believe I committed anything they</p> <p>6 could charge me for, sir.</p> <p>7 Q I'm quite sure you didn't, but the...</p> <p>8 Did you -- did you take notes of any of this?</p> <p>9 A No, sir.</p> <p>10 Q Did you record any of it with any</p> <p>11 audio-recording device?</p> <p>12 A No, sir.</p> <p>13 Q So other than everybody's kind of gross</p> <p>14 recollection, we don't know what you did, right?</p> <p>15 A Other than a recollection of my report, yes,</p> <p>16 sir.</p> <p>17 Q Okay. Now, you say -- well...</p> <p>18 Officers are supposed to be trained how to</p> <p>19 deal with the mentally ill, aren't they?</p> <p>20 A Officers are supposed to be trained, just</p> <p>21 generally?</p> <p>22 Q Yeah.</p> <p>23 A I would say that in general, yes, they should</p> <p>24 have some level of training.</p> <p>25 Q Okay.</p> | <p style="text-align: right;">144</p> <p>1 Q All right. You wrote one thing.</p> <p>2 A Yes, sir.</p> <p>3 Q Do you see what you wrote?</p> <p>4 A Yes, sir, I do.</p> <p>5 Q Is what you wrote inconsistent with</p> <p>6 Callahan's statement to Fors and Klund on September</p> <p>7 15th?</p> <p>8 A No, sir.</p> <p>9 Q Okay.</p> <p>10 Now, you -- you speculate that had Mr. Smith</p> <p>11 complied with the officers' request, they would have</p> <p>12 simply walked with him as he exited the building. You</p> <p>13 don't know that for a fact, do you?</p> <p>14 A Both the officers said that.</p> <p>15 Q Okay. Well, they didn't stop putting force</p> <p>16 on him once -- when he complied and gave up; correct?</p> <p>17 A By "putting force on him," what do you mean,</p> <p>18 sir?</p> <p>19 Q I mean kneeling on him and sitting on him</p> <p>20 such that he was mechanically asphyxiated.</p> <p>21 A I -- I can't agree with that. I can agree</p> <p>22 that they did not -- they -- they were engaged with him</p> <p>23 the entire time.</p> <p>24 Q Well, they were placing weight on him,</p> <p>25 weren't they, while he was in the prone restraint</p> |
| <p style="text-align: right;">143</p> <p>1 Now, you see on page 13 in your report that</p> <p>2 the material reviewed indicates that Mr. Smith was,</p> <p>3 quote, "combative throughout his interactions with the</p> <p>4 officers, including during the restraint process."</p> <p>5 Do you see that?</p> <p>6 Right here (indicating).</p> <p>7 A Yes, sir.</p> <p>8 Q All right.</p> <p>9 A Yes, sir.</p> <p>10 Q I read your language correctly?</p> <p>11 A Yes, sir.</p> <p>12 Q And that would be inconsistent with the</p> <p>13 statement given at the first opportunity by Officer</p> <p>14 Callahan where he basically said that once he was --</p> <p>15 "arms were fully behind his back and handcuffed</p> <p>16 together, it was at this time that Smith seemed to calm</p> <p>17 down a bit and was not resisting as hard. I believed</p> <p>18 that Smith was giving up at this time and complying."</p> <p>19 That is not the same as being combative</p> <p>20 throughout his interactions with the officers,</p> <p>21 including during the restraint process, is it?</p> <p>22 A You've read me two very long things and asked</p> <p>23 me a question. Can you please ask it --</p> <p>24 Q All right.</p> <p>25 A -- again?</p> | <p style="text-align: right;">145</p> <p>1 position?</p> <p>2 A They were placing weight on him, yes, sir.</p> <p>3 Q Okay. How much weight you don't know?</p> <p>4 A Exactly? No, sir.</p> <p>5 Q And did you -- did you have Gorman -- how</p> <p>6 much weight did Gorman place on you? Half of his</p> <p>7 weight? A third of his weight?</p> <p>8 A What he was asked to do is put weight that,</p> <p>9 to the best of his recollection, is the same as he put</p> <p>10 on Mr. Smith.</p> <p>11 Q Did you ask him about that?</p> <p>12 A Pardon me?</p> <p>13 Q Did you ask him how much weight he did?</p> <p>14 A No.</p> <p>15 Q I mean, you realize that he could -- you can</p> <p>16 modulate how much weight you put on one knee versus</p> <p>17 another, correct?</p> <p>18 A Certainly.</p> <p>19 Q All right. I mean, I was over at the</p> <p>20 national duels, and you can have all of your -- you can</p> <p>21 have both of your legs touching and being -- applying</p> <p>22 different points of weight at different -- at different</p> <p>23 parts on somebody else's body, though, correct?</p> <p>24 A I have no idea what you're referring to, sir.</p> <p>25 Q All right. Well, forget it. Get it from</p> |

37 (Pages 142 to 145)

Michael Berkow
2/25/2013

| | |
|---|--|
| <p style="text-align: right;">146</p> <p>1 somebody else.</p> <p>2 You'd agree with me that your perceptions</p> <p>3 about what happened during this visit with Gorman and</p> <p>4 Tracey Fussy and Burt Osborne and Callahan at the Y on</p> <p>5 March 12th that didn't even amount to a reenactment</p> <p>6 wouldn't be relevant to what David Smith felt on</p> <p>7 September 10, 2010, correct?</p> <p>8 A No.</p> <p>9 Q September 9th --</p> <p>10 A I would not agree with you.</p> <p>11 Q You wouldn't? How would it be relevant?</p> <p>12 A What I was trying to do was understand the</p> <p>13 officers' positioning on Mr. Smith's body.</p> <p>14 Q Okay. But you didn't verify that with any of</p> <p>15 the available video evidence, correct?</p> <p>16 A On that day, no.</p> <p>17 Q On any day. I mean, since you didn't -- you</p> <p>18 couldn't verify it today if you wanted to, could you?</p> <p>19 A Sure. I can certainly testify as to how they</p> <p>20 positioned themselves on me and that I've looked at the</p> <p>21 videos and whether they're consistent or inconsistent.</p> <p>22 Q That's if you remember right. But you could</p> <p>23 have filmed it; we'd have known, right?</p> <p>24 A Is your question could it have been filmed?</p> <p>25 Q Could it have been filmed? Could you have</p> | <p style="text-align: right;">148</p> <p>1 how they were positioned on Mr. Smith while he was</p> <p>2 prone on the gym floor.</p> <p>3 Q Okay. Where did he put his knee?</p> <p>4 A Variety of positions on my back.</p> <p>5 Q Did he say which one was the one he used?</p> <p>6 A Well, he moved, because he switched from one</p> <p>7 knee to the other, just as he did in the actual</p> <p>8 incident.</p> <p>9 Q How do you know he moved correctly?</p> <p>10 A I'm sorry?</p> <p>11 Q How do you know that he described or placed</p> <p>12 his knee correctly?</p> <p>13 A I know that he did it to the best of his</p> <p>14 ability.</p> <p>15 Q How do you know he did it correctly?</p> <p>16 A Correctly as compared to what, sir?</p> <p>17 Q Empirically correctly; that is, the same.</p> <p>18 A There isn't 100 percent record of where his</p> <p>19 knee is.</p> <p>20 Q Okay.</p> <p>21 Tell me, how is it that you reconcile the</p> <p>22 fact that you say Mr. Smith was combative throughout</p> <p>23 his interactions with the officers, including during</p> <p>24 the restraint process, with Callahan's five-day-old</p> <p>25 recollection of it with Fors? How do you reconcile</p> |
| <p style="text-align: right;">147</p> <p>1 documented it with still photos?</p> <p>2 A Yes.</p> <p>3 Q Could you have recorded it audio -- with</p> <p>4 audio equipment?</p> <p>5 A Yes, sir, I could have.</p> <p>6 Q You did none of those?</p> <p>7 A I did not.</p> <p>8 Q And you said it isn't even good enough to be</p> <p>9 a reenactment, correct?</p> <p>10 A Well, it's a -- I said that in the context of</p> <p>11 which you were asking me about full-blown reenactments</p> <p>12 with filming. And so we were having a discussion about</p> <p>13 filming the entire reenactment.</p> <p>14 Q You said some reenactments you filmed and</p> <p>15 some you didn't, right?</p> <p>16 A That's correct.</p> <p>17 Q But they were reenactments nonetheless. You</p> <p>18 tried to replicate the event, correct?</p> <p>19 A The full-blown event. In this case I was not</p> <p>20 trying to do that, no, sir.</p> <p>21 Q Correct.</p> <p>22 So how you felt about not -- about some</p> <p>23 individualized part of an event, how would that be</p> <p>24 relevant to --</p> <p>25 A I was focused on that individualized part of</p> | <p style="text-align: right;">149</p> <p>1 that?</p> <p>2 A Well, he says, "He seemed to calm down a</p> <p>3 bit" --</p> <p>4 Q Yes.</p> <p>5 A -- "and was not resisting as hard."</p> <p>6 Q Yes.</p> <p>7 A So if he's not resisting as hard --</p> <p>8 Q Read the rest -- and then the next sentence.</p> <p>9 A "I believed that he was giving up at this</p> <p>10 time and complying."</p> <p>11 Q "Giving up and complying."</p> <p>12 A Right. So the two sentences are</p> <p>13 inconsistent.</p> <p>14 Q Okay. Or that -- or he became more compliant</p> <p>15 as he went on, right? That's -- I believed he was</p> <p>16 giving up and complying is not being combative, is it?</p> <p>17 A That sentence? No, sir.</p> <p>18 Q Okay.</p> <p>19 And as we established, Callahan was there and</p> <p>20 you weren't?</p> <p>21 A Yes, sir.</p> <p>22 Q And you didn't think that was important</p> <p>23 enough to include in your report, that I was giving</p> <p>24 up -- I believed that he was giving up and complying?</p> <p>25 A I believe I covered that on page 10 of my</p> |

38 (Pages 146 to 149)

Michael Berkow
2/25/2013

| | |
|--|--|
| <p>150</p> <p>1 report.</p> <p>2 Q What language do you look at for that?</p> <p>3 A When they talk about fully positioning him.</p> <p>4 So --</p> <p>5 Q Find -- all right. Where is this? Where</p> <p>6 does it say --</p> <p>7 A It's -- go ahead. I'm sorry.</p> <p>8 Q Just tell me where you're looking at.</p> <p>9 A I'm just looking at the bottom of the first</p> <p>10 paragraph. And then it continues throughout that page.</p> <p>11 It's describing the incident.</p> <p>12 Q I know. But nowhere does it say Callahan</p> <p>13 believed he was giving up and complying. It doesn't</p> <p>14 say that.</p> <p>15 A You're asking me if I quoted from Callahan?</p> <p>16 The answer is no, sir.</p> <p>17 Q Well, you don't even get the concept in here.</p> <p>18 Find me language that you think gets that concept in</p> <p>19 your report.</p> <p>20 A I think what he gets to is they got him</p> <p>21 handcuffed and they've secured him, he's positioned on</p> <p>22 him to prevent him from getting up or rolling. They</p> <p>23 remained in position.</p> <p>24 Q Well, that they accomplished, right? He</p> <p>25 didn't get up or roll.</p> | <p>152</p> <p>1 you went to the YMCA gym on March 12th, 2012?</p> <p>2 A Not that I recall, sir, no.</p> <p>3 Q Okay. Never talked to Callahan at all about</p> <p>4 that?</p> <p>5 A I don't believe so, no, sir.</p> <p>6 Q Okay.</p> <p>7 Because if he's giving up, you don't have to</p> <p>8 pin him to the ground, do you?</p> <p>9 A If someone had completely surrendered and had</p> <p>10 given up, no, you don't.</p> <p>11 Q How do you completely surrender if you're</p> <p>12 handcuffed in the prone position? What would you do to</p> <p>13 completely surrender?</p> <p>14 A You'd stop struggling. This suggests that he</p> <p>15 was still resisting. He's not resisting as hard.</p> <p>16 Q That was one sentence. And read the next one</p> <p>17 again.</p> <p>18 A The two are -- I said the two sentences are</p> <p>19 in conflict.</p> <p>20 Q Or they're chronologically correct, that he</p> <p>21 went from not resisting as hard to giving up and</p> <p>22 complying.</p> <p>23 A That would be one interpretation.</p> <p>24 Q Certainly one that -- that Officer Callahan</p> <p>25 came to.</p> |
| <p>151</p> <p>1 A No. That's right.</p> <p>2 Q Ever. Right?</p> <p>3 A Is that a comment or a question, sir?</p> <p>4 Q He never got up again, did he?</p> <p>5 A Well, they rolled him over, certainly.</p> <p>6 Q Yeah, okay.</p> <p>7 Where do you say that -- at the point in time</p> <p>8 that he was handcuffed, you say, "Mr. Smith was</p> <p>9 facedown on the gym floor while Callahan was positioned</p> <p>10 on top of his legs, both knees on the ground on either</p> <p>11 side of his legs (Smith's legs), basically pinning them</p> <p>12 and preventing Mr. Smith from getting up, kicking, or</p> <p>13 rolling over."</p> <p>14 A Yes, sir.</p> <p>15 Q Then you say -- but you don't say that at</p> <p>16 this point in time Mr. Smith, by Callahan's own</p> <p>17 admission, was giving up and complying, do you?</p> <p>18 A I don't know if he was giving up and</p> <p>19 complying.</p> <p>20 Q Well, you do if you listen -- if you read</p> <p>21 Mr. Callahan's -- or Officer Callahan's statement,</p> <p>22 right?</p> <p>23 A It's in conflict with the sentence before</p> <p>24 that.</p> <p>25 Q Okay. Well, did you ask him about that when</p> | <p>153</p> <p>1 A I don't know that.</p> <p>2 Q Okay.</p> <p>3 Your opinion number three is an interesting</p> <p>4 opinion to me. Page 16, you say, "During the officers'</p> <p>5 efforts to gain control of Mr. Smith during his violent</p> <p>6 resistance, the placing of Mr. Smith in a prone</p> <p>7 position to facilitate handcuffing and control was</p> <p>8 appropriate."</p> <p>9 You say that, correct?</p> <p>10 A Yes, sir.</p> <p>11 Q After he was placed in the prone position for</p> <p>12 the next four and a half minutes, do you find that</p> <p>13 their activities were appropriate?</p> <p>14 A Their -- can you be a little more detailed</p> <p>15 about your question, sir?</p> <p>16 Q You're talking about the efforts to gain</p> <p>17 control and the placing, in opinion number three.</p> <p>18 A Yes, sir.</p> <p>19 Q And I'm talking about for the four and a half</p> <p>20 minutes after he was done being placed --</p> <p>21 A Uh-huh.</p> <p>22 Q -- while they continued to put pressure on</p> <p>23 him, such that the Hennepin County medical examiner</p> <p>24 believes they committed a homicide by mechanically</p> <p>25 asphyxiating him. Is it your view and opinion to a</p> |

39 (Pages 150 to 153)

Michael Berkow
2/25/2013

| | | | |
|-----|---|-----|--|
| 154 | <p>1 reasonable degree of professional certainty that</p> <p>2 their -- their conduct was appropriate?</p> <p>3 A I think you're going to have to break that</p> <p>4 down. You've thrown a whole bunch of things into that</p> <p>5 question, sir.</p> <p>6 Q What don't you understand about it?</p> <p>7 A Well, you're adding things about the medical</p> <p>8 examiner. So --</p> <p>9 Q Well, you know what the medical examiner</p> <p>10 said. You don't disagree with him because you're not a</p> <p>11 medical guy. You accept what the medical examiner</p> <p>12 says, right?</p> <p>13 A So --</p> <p>14 MR. OSBORNE: The medical examiner, though,</p> <p>15 Bob, didn't say he committed a homicide.</p> <p>16 MR. BENNETT: Yeah, he did.</p> <p>17 MR. OSBORNE: He said the manner of --</p> <p>18 it's -- it's the -- the cause of death or the manner of</p> <p>19 death.</p> <p>20 MR. BENNETT: Is a homicide. That's death</p> <p>21 caused by another.</p> <p>22 MR. OSBORNE: No. I think we just agree that</p> <p>23 the medical examiner's report says what it says.</p> <p>24 BY MR. BENNETT:</p> <p>25 Q All right. The medical examiner found that</p> | 156 | <p>1 know, right?</p> <p>2 A No. The answer is I'm -- I'm testifying it</p> <p>3 was several minutes, but I didn't put a watch on it.</p> <p>4 Q Well, did you make any effort to time it?</p> <p>5 A I was on the ground for a period of time</p> <p>6 while he was kneeling on me.</p> <p>7 Q How long was Callahan on you?</p> <p>8 A Again, for some period of time.</p> <p>9 Q Do you know how long?</p> <p>10 A I did not time it.</p> <p>11 Q Now, if Officer Gorman knelt on your back and</p> <p>12 Callahan wasn't there -- and you weren't handcuffed,</p> <p>13 right?</p> <p>14 A No, sir, I was not handcuffed.</p> <p>15 Q You could have gotten up, right?</p> <p>16 A You mean I could have forced my way up --</p> <p>17 Q Yeah.</p> <p>18 A -- when he was on my back?</p> <p>19 Q Yeah.</p> <p>20 A I certainly could have struggled with him,</p> <p>21 yes.</p> <p>22 Q Do you believe you could have gotten up?</p> <p>23 A I have no idea.</p> <p>24 Q Well, you could have easily gotten out of the</p> <p>25 way of one knee, correct? You can't hold someone to</p> |
| 155 | <p>1 the manner of death was a homicide, correct?</p> <p>2 A Yes, sir.</p> <p>3 Q And that the -- the -- it was -- in fact, he</p> <p>4 says in the part you read, it was -- it was the</p> <p>5 pressure from Gorman's knees or knees -- knee or knees</p> <p>6 that caused the mechanical asphyxia. You read that,</p> <p>7 right? Do you accept that?</p> <p>8 A We read a portion of his deposition, yes,</p> <p>9 sir.</p> <p>10 Q Well, you didn't want to read both, both</p> <p>11 days.</p> <p>12 But what I'm getting at is after the</p> <p>13 restraint, do you find -- after they're done getting</p> <p>14 him in the prone restraint position with Gorman</p> <p>15 positioned how he was positioned and Callahan</p> <p>16 positioned as he was positioned, for the next four and</p> <p>17 a half minutes after that, are you saying that their</p> <p>18 activities were appropriate? Yes or no?</p> <p>19 A Their activities were reasonable, yes.</p> <p>20 Q Okay. Thanks.</p> <p>21 How long did Gorman keep his knee or knees on</p> <p>22 you?</p> <p>23 A It was several minutes, at least. I didn't</p> <p>24 time it.</p> <p>25 Q How do you know? The answer is you don't</p> | 157 | <p>1 the ground with one knee, can you?</p> <p>2 A Well, I'm not a wrestler. Your colleague</p> <p>3 would be a wrestler. But certainly I -- he had me</p> <p>4 securely -- in a secure position. Could I have gotten</p> <p>5 up? I believe I could have --</p> <p>6 Q Sure.</p> <p>7 A -- yes, sir.</p> <p>8 I should say, could I have fought my way up?</p> <p>9 Certainly, if that was the question.</p> <p>10 Q Uh-huh.</p> <p>11 Now, you mention that Officer Callahan can be</p> <p>12 heard to ask, "Is he breathing?" On page 19 of your</p> <p>13 report. Last sentence.</p> <p>14 A Where is it? I'm sorry?</p> <p>15 Q Bottom.</p> <p>16 A On 19? I think we're looking at different</p> <p>17 documents, sir.</p> <p>18 Q 17. Excuse me. Pardon me.</p> <p>19 A Yes, sir.</p> <p>20 Q And Callahan testified that that was not a</p> <p>21 serious question, correct?</p> <p>22 A I don't recall that, sir.</p> <p>23 Q Okay.</p> <p>24 Gorman answers, you say, in the affirmative?</p> <p>25 A Yes, sir.</p> |

Michael Berkow
2/25/2013

| | |
|---|---|
| <p>158</p> <p>1 Q Do you know if Gorman -- and Gorman testified 2 he didn't do anything to check. You're aware of that? 3 A I don't recall from his deposition 4 specifically what he said about this. 5 Q In fact, we know as a matter of fact that 6 that's impossible, don't we? 7 A No, sir. 8 Q You don't think it was impossible that two 9 and a half minutes after he's done agonally breathing, 10 he could have been breathing? 11 A I've already answered your question, sir. 12 I'm not familiar with agonal breathing. I don't know 13 when he -- he died, so I'm -- I can't tell you what, I 14 can't -- I certainly can't answer the question "it's 15 impossible." 16 Q When you're agonally breathing, you 17 understand that all the medical people say you're very 18 close to death? 19 A I don't understand that, no, sir. 20 Q You don't? You didn't read those 21 depositions? 22 A If I -- I don't recall seeing it in that 23 language, sir. 24 Q Okay. All right. 25 A I've seen it called a variety of different </p> | <p>160</p> <p>1 A I understand that you're applying pressure. 2 Q You understand -- 3 A I've not heard it -- I've not heard it 4 described as "mechanical force," sir. 5 Q Well, I'm using a device. 6 A Okay. 7 Q I could use my fist, or I can use the pen. 8 A Okay. 9 Q Those would both be mechanical applications 10 of force, would they not? 11 A I don't know. If you'd like me to use the 12 definition, that's fine. 13 Q Well, I'd like you to use one that is common 14 sense and like you were taught in physics class in high 15 school. That's what I was taught, but maybe you didn't 16 take physics. 17 Can you point to me where in this document 18 you contained -- where in this document -- start over. 19 Can you tell me where in this document it is 20 contained any facts to support an opinion from you that 21 the officers properly monitored Smith's condition? 22 A I think there's a number of discussion points 23 in here where they are asking him; Callahan is checking 24 on him; they continue to ask him questions throughout 25 this encounter. </p> |
| <p>159</p> <p>1 kinds of breathing. 2 Q Okay. 3 Again, you say, "The actions of" -- on page 4 18: "The actions of Gorman and Callahan were 5 reasonable in their efforts to gain control of Smith." 6 But you don't -- you don't ever specifically 7 say in this report that they were reasonable in their 8 efforts once they had gained control of Mr. Smith, do 9 you? 10 A I don't believe I parse the incident in that 11 fashion, no, sir. 12 Q Well, there's this pesky little four and a 13 half minutes after they gain control in which they 14 continue to put pressure on him, downward pressure, 15 mechanical pressure. You understand that, right? 16 Where they're both doing it? 17 A I don't know what you mean by "mechanical 18 pressure." I'm aware of the fact that they're both -- 19 Q A downward force is mechanical force. You 20 understand that, don't you? 21 A I'm not familiar with that terminology, no, 22 sir. 23 Q Okay. So I'm pushing down on this piece of 24 paper with a pen. You don't understand that I'm 25 applying a mechanical force? </p> | <p>161</p> <p>1 Q But we've established that asking dead or 2 unconscious people questions isn't going to do you very 3 much good, is it? 4 A If you're asking dead or unconscious people, 5 no. 6 Q Okay. Any other monitoring conduct other 7 than asking dead or unconscious people questions? 8 A You're merging a couple of things, sir. 9 Q Well, I mean -- 10 A So let's separate the question, please. 11 Q Other than asking him questions, did they do 12 anything before they at 7:53 took his pulse? 13 A Is that the first taking of the pulse or the 14 second, sir? 15 Q The first, according to Callahan's testimony 16 and Case's (indicating document). 17 A Yeah, I believe if you look at this, there's 18 a whole bunch of things where they're talking to him 19 prior to that, asking a bunch of questions, and there's 20 a period of time when both of them at different times 21 lean over closer towards his -- his face and head. 22 Q You could see his eyes were open, his eyes -- 23 they were unblinking on the videotape, couldn't you? 24 A At a certain point in time, yes, sir. 25 Q Okay. </p> |

41 (Pages 158 to 161)

Michael Berkow
2/25/2013

| | |
|---|---|
| <p style="text-align: right;">162</p> <p>1 A Yes, sir. I could see that they were open. 2 I don't know that I could see they were unblinking, but 3 I could see they were open. 4 Q They were -- his eyelids were fixed, weren't 5 they? 6 A I didn't see that, no, sir. I saw that his 7 eyes were open. 8 Q Okay. 9 A It's a side view that I -- I recall right 10 now. 11 Q You read Dolan's deposition? 12 A Chief Dolan? Yes, sir, I've read his 13 deposition. 14 Q And he admits to applying a subjective 15 standard to determine discipline for Fourth Amendment 16 violations, correct? 17 A I didn't understand it that way, no, sir. 18 Q Well, he said he didn't believe the officers 19 meant to do anything wrong. That's a subjective 20 analysis, isn't it? 21 A That would be, yes, sir. 22 Q Okay. And that's why he didn't discipline 23 them? 24 A No, I didn't see that, sir. 25 Q Okay.</p> | <p style="text-align: right;">164</p> <p>1 sir. 2 Q Well, first of all, the police doesn't decide 3 to call grand juries. Right? Police departments don't 4 do that; that's not their -- within their purview. 5 A If you're asking if a police department 6 impanels a grand jury -- 7 Q Yeah. 8 A Not in my experience, no, sir. 9 Q No. No. 10 A Might be true somewhere in this country; I 11 don't know. 12 Q But it isn't true here, as far as you know. 13 The police -- the Hennepin County Attorney's Office 14 decides whether to impanel a grand jury or not, 15 correct? 16 A Impanel? I have no idea. 17 Q To call a grand jury, to bring a -- any -- 18 they decide what to bring in front of the grand jury? 19 A I -- I don't know the practice here. 20 Q Well, the practice is not for the MPD to 21 submit a case to the grand jury. 22 In fact, that didn't happen, did it? 23 A I'm sorry? 24 Q MPD doesn't -- 25 A The case was considered by the grand jury.</p> |
| <p style="text-align: right;">163</p> <p>1 You say -- this -- you say that "Mr. Ryan 2 opines that Chief Dolan has introduced the subjective 3 use-of-force analysis into the Minneapolis Police 4 Department." 5 Do you quarrel with that? 6 A Can you tell me where you are reading, sir? 7 Q Page 21. 8 A Yes, sir. 9 Q And that's true, isn't it? 10 A No, I didn't agree with it. 11 Q Well, that's what he testified, that he would 12 have -- he didn't discipline them because he think -- 13 thought that he didn't -- they didn't mean to do it. 14 A I don't recall that as his testimony, sir. 15 Q Then the next sentence says, "It's critical 16 to remember that the MPD submitted this case to the 17 grand jury for review." 18 Why is that critical to remember? It doesn't 19 have anything to do with discipline. 20 A It's -- it's certainly indicative of a 21 thorough follow-through to this. There's an awful lot 22 of cases that are not submitted criminally and not 23 submitted to grand jury, in my experience. 24 Q In fact, it's just wrong factually, isn't it? 25 A I -- I -- I don't understand the question,</p> | <p style="text-align: right;">165</p> <p>1 Q You say -- I'm just -- you're the guy -- you 2 know, you're the language parser here. You say that 3 the -- "It is critical to remember that the MPD 4 submitted a case to the grand jury for review." That 5 is in fact false, is it -- isn't it? 6 A Not to my knowledge, no, sir. 7 Q Oh. Who -- tell me what document you rely on 8 to support that fact. 9 A I don't recall specifically, but I've been 10 informed that this case was presented -- was presented 11 to the grand jury. So that's a -- that's -- 12 Q I don't disagree with you. But by the 13 Hennepin County Attorney's Office, not by the MPD. The 14 MPD has nothing to do with -- 15 A Well, the MPD conducted that investigation, 16 prepared that investigation, and then handed that for 17 presentation to the grand jury. 18 Q Well, they handed it to the county attorney 19 for a decision. Right? 20 A They -- it went to the grand jury. It wasn't 21 the county attorney that unilateral -- 22 Q Well, I didn't write that the MPD submitted a 23 case to the grand jury. You did that, right? 24 A That's right. 25 Q You don't know if it's right or not, as you</p> |

Michael Berkow
2/25/2013

| | |
|---|---|
| <p>166</p> <p>1 sit here today?</p> <p>2 A That is my understanding, that this case was</p> <p>3 submitted to the grand jury by the police department.</p> <p>4 Q By the police department?</p> <p>5 A Correct.</p> <p>6 Q Okay. All right. Thanks.</p> <p>7 And when you say, "That is far from the chief</p> <p>8 applying any view of his own to the process; he is</p> <p>9 turning over the determination to an outside entity,"</p> <p>10 he doesn't turn over his disciplinary proceedings to an</p> <p>11 outside entity, does he?</p> <p>12 A To the grand jury?</p> <p>13 Q Yeah.</p> <p>14 A No, sir.</p> <p>15 Q So what are you trying to say there?</p> <p>16 A What I'm saying is that he -- there is an</p> <p>17 outside, independent review of the facts of this case.</p> <p>18 Q No, you said he is turning over the</p> <p>19 determination to an outside entity. What does that</p> <p>20 mean?</p> <p>21 A It means --</p> <p>22 Q You're talking -- is "he" Dolan?</p> <p>23 A To the best of my knowledge, yes.</p> <p>24 Q How is he turning over the determination to</p> <p>25 an outside entity?</p> | <p>168</p> <p>1 Q She was -- eventually became the investigator</p> <p>2 for the workplace investigation unit in 2005?</p> <p>3 A One of a number. Wasn't -- she was not a</p> <p>4 sole.</p> <p>5 Q What is the WIU, workplace investigation</p> <p>6 unit?</p> <p>7 A It was a small unit created to look into</p> <p>8 hostile workplace environment issues, retaliation</p> <p>9 issues, other kinds of particular workplace complaints.</p> <p>10 Q Did she -- well, let me ask you this: Were</p> <p>11 you engaging in intimate relationships with any women</p> <p>12 working at the LAPD during your time as deputy chief?</p> <p>13 MR. OSBORNE: Objection; relevance.</p> <p>14 MR. BENNETT: Depends on his answer.</p> <p>15 A I'm actually not going to go through that</p> <p>16 lawsuit again. I was dismissed from that lawsuit by --</p> <p>17 at summary judgment. So if you'd like to go through</p> <p>18 the details, I think you're probably going to have to</p> <p>19 go a little further. But I was dismissed.</p> <p>20 BY MR. BENNETT:</p> <p>21 Q Just depends on -- you can -- that's fine.</p> <p>22 I'm asking you just -- you can give me a yes or no</p> <p>23 answer. Were you engaging in intimate relationships</p> <p>24 with any women working at the LAPD during your time as</p> <p>25 deputy chief? Yes or no?</p> |
| <p>167</p> <p>1 A Submitting the case to the grand jury.</p> <p>2 Q All right. So now it's not just the MPD,</p> <p>3 it's Dolan submitted the case to grand jury; is that</p> <p>4 right?</p> <p>5 A Well, Dolan is the leader of the MPD.</p> <p>6 Q Okay. Okay. All right.</p> <p>7 How many times have you been named defendant</p> <p>8 in a lawsuit before?</p> <p>9 A I don't know exactly.</p> <p>10 Q A lot?</p> <p>11 A No. I wouldn't say that. Depends on how you</p> <p>12 define "a lot."</p> <p>13 Q In May of 2006 were you named as a defendant</p> <p>14 in a case brought by Ms. Ya-May Christle?</p> <p>15 A Yes.</p> <p>16 Q She was an officer that was promoted several</p> <p>17 times and eventually began working in Internal Affairs</p> <p>18 for the LAPD in 2003?</p> <p>19 A I don't know when she worked for the LAPD,</p> <p>20 what year she started.</p> <p>21 Q Okay. Forget the year. Was she promoted --</p> <p>22 was -- she's an officer who you know to be promoted</p> <p>23 several times and worked in Internal Affairs?</p> <p>24 A I know her to have been promoted once. She</p> <p>25 was a sergeant. I don't know about "several times."</p> | <p>169</p> <p>1 A I guess I don't -- I would like to talk to my</p> <p>2 lawyer about that for just a second, if you don't mind.</p> <p>3 MR. BENNETT: All right. We can break and</p> <p>4 talk to your lawyer.</p> <p>5 VIDEOGRAPHER: Off the video record at</p> <p>6 12:34 p.m.</p> <p>7 (Recess taken.)</p> <p>8 VIDEOGRAPHER: We are back on the video</p> <p>9 record. The time is 12:41 p.m.</p> <p>10 MR. OSBORNE: Bob, I -- you know, I guess</p> <p>11 I'll just have a standing objection to the relevance of</p> <p>12 any of this, and --</p> <p>13 MR. BENNETT: Well, it'll depend on how he</p> <p>14 answers, if it becomes relevant. If he answers</p> <p>15 truthfully, I guess it won't be irrelevant, it -- it</p> <p>16 will be fine. You know, we can decide what, you know,</p> <p>17 is relevant depending on the answers. That's -- that's</p> <p>18 the trouble with this line of questioning.</p> <p>19 MR. OSBORNE: All right.</p> <p>20 Was there a question pending when we took a</p> <p>21 break?</p> <p>22 BY MR. BENNETT:</p> <p>23 Q I think it was, were you engaging in intimate</p> <p>24 relationships with any women working at the LAPD during</p> <p>25 your time as deputy chief?</p> |

43 (Pages 166 to 169)

Michael Berkow
2/25/2013

| | |
|--|--|
| <p>170</p> <p>1 A Yes.</p> <p>2 Q Did you violate any LAPD policies by engaging</p> <p>3 in said relationships?</p> <p>4 A I don't -- I don't exactly know, no, sir.</p> <p>5 Q Did you violate any LAPD policies by not</p> <p>6 reporting the relationships to your superior officer?</p> <p>7 A That's the only question, whether or not</p> <p>8 there would have been a violation there.</p> <p>9 Q Were you disciplined for that?</p> <p>10 A No, sir.</p> <p>11 Q Did it have anything to do with your</p> <p>12 departure from LAPD?</p> <p>13 A Absolutely none.</p> <p>14 Q What is the Bradbury Building?</p> <p>15 A It's an office building in downtown Los</p> <p>16 Angeles.</p> <p>17 Q Is that where the LAPD's Professional</p> <p>18 Standards Bureau worked?</p> <p>19 A It's one of the buildings.</p> <p>20 Q Is that the bureau -- was the bureau part of</p> <p>21 your duty assignment as deputy chief?</p> <p>22 A Yes, sir.</p> <p>23 Q Did you maintain an office in that building</p> <p>24 to sleep in?</p> <p>25 A Not an office to sleep in, no, sir. Just</p> | <p>172</p> <p>1 There were multiple allegations in the</p> <p>2 lawsuit, to the best of my recollection.</p> <p>3 Q Have you ever discussed with other</p> <p>4 individuals who hired you to do expert consulting</p> <p>5 about -- other than Mr. Osborne -- about not putting</p> <p>6 you on the stand as a result of that lawsuit or that</p> <p>7 conduct?</p> <p>8 A No, sir.</p> <p>9 (Reporter's Note: Sotto voce communication</p> <p>10 between Mr. Bennett and Mr. Storms.)</p> <p>11 MR. STORMS: Can we go off the record for a</p> <p>12 second?</p> <p>13 MR. BENNETT: Yeah, let's go off the record.</p> <p>14 VIDEOGRAPHER: Off the video record at</p> <p>15 12:44 p.m.</p> <p>16 (Off the record.)</p> <p>17 VIDEOGRAPHER: We are back on the video</p> <p>18 record. It is 12:51 p.m.</p> <p>19 BY MR. BENNETT:</p> <p>20 Q Mr. Berkow, we just had the opportunity to</p> <p>21 view a training video that was done at least in part by</p> <p>22 the New York City medical examiner and the New York</p> <p>23 City Police Department and has now been utilized for</p> <p>24 training in the Minneapolis Police Department. Did you</p> <p>25 get a chance to look at the video?</p> |
| <p>171</p> <p>1 a -- there was a sleep room.</p> <p>2 Q The...</p> <p>3 Do you know who Andrea Balter is?</p> <p>4 A Yes, sir.</p> <p>5 Q Did she sue you and the LAPD and the City of</p> <p>6 Los Angeles?</p> <p>7 A No.</p> <p>8 MR. BENNETT: Oh, is that Christle?</p> <p>9 BY MR. BENNETT:</p> <p>10 Q Who -- who -- when you say what lawsuit you</p> <p>11 were dismissed in, was that Christle's lawsuit?</p> <p>12 A Yes.</p> <p>13 Q And that's the one you were -- you were</p> <p>14 dismissed individually, but they paid over a million</p> <p>15 dollars or got a jury verdict in excess of a million</p> <p>16 dollars on the retaliation claim?</p> <p>17 A There were a number of defendants. I was</p> <p>18 dismissed. I don't -- I don't know what the exact</p> <p>19 result was.</p> <p>20 Q Was the gist of her lawsuit against you and</p> <p>21 the City of Los Angeles that she was retaliated against</p> <p>22 for reporting your misconduct related to -- relating to</p> <p>23 a sexual relationship and the handling of computer</p> <p>24 evidence in a criminal matter?</p> <p>25 A No. Not to my knowledge, no, sir.</p> | <p>173</p> <p>1 A Yes, sir.</p> <p>2 Q And have you received training from either</p> <p>3 medical or law enforcement professionals similar to</p> <p>4 that, expressed in that video?</p> <p>5 A I don't recall receiving training. Certainly</p> <p>6 read articles that...</p> <p>7 Q Were consistent with it?</p> <p>8 A That discuss some of these same issues, yes,</p> <p>9 sir.</p> <p>10 Q Do you have any disagreement with the</p> <p>11 training video provided by the New York City and the</p> <p>12 Minneapolis Police Department?</p> <p>13 A In a broad sense, no, sir.</p> <p>14 Q Okay. Are you aware of training of that type</p> <p>15 being provided to the LAPD officers?</p> <p>16 A Not that I recall, no, sir. Not of that</p> <p>17 specifically.</p> <p>18 Q Okay. Now, you saw them talking about</p> <p>19 kneeling on the officer -- on the subject, correct?</p> <p>20 A I heard a variety of things about being on</p> <p>21 someone's back.</p> <p>22 Q Including kneeling?</p> <p>23 A Could have been. I -- I didn't memorize the</p> <p>24 video.</p> <p>25 Q Did you see the video images of the person</p> |

44 (Pages 170 to 173)

Michael Berkow
2/25/2013

| | | |
|-----|--|-----|
| 174 | <p>1 kneeling with one knee on the back?</p> <p>2 A I saw a number of people on the back of an</p> <p>3 individual, yes, sir. A swarm.</p> <p>4 Q One of them kneeling with one knee, right,</p> <p>5 that you could see over the top of his neck? From</p> <p>6 the -- approaching him from the neck/shoulder area down</p> <p>7 to the mid-scapula?</p> <p>8 A I don't -- I may have. I don't -- I saw a</p> <p>9 number of people on the backs of these individuals.</p> <p>10 Q Okay. And you also heard the -- the -- the</p> <p>11 warning not to restrict the movement of the legs of the</p> <p>12 individuals, correct?</p> <p>13 A Not to restrict the movement --</p> <p>14 Q Not to hold the legs down, not to tie them</p> <p>15 up, not to hobble them. There were several examples</p> <p>16 they gave about not restraining the legs as well.</p> <p>17 A Actually, I thought I heard something that</p> <p>18 says tie -- tie the legs, but don't hobble them, I</p> <p>19 thought I heard.</p> <p>20 Q No, I don't think that was there, but...</p> <p>21 A Well --</p> <p>22 Q I guess the -- it'll --</p> <p>23 A I've seen it once.</p> <p>24 MR. STORMS: Should we make that video an</p> <p>25 exhibit?</p> | 176 |
| 175 | <p>1 MR. BENNETT: Hmmmm?</p> <p>2 MR. STORMS: Should we make that video an</p> <p>3 exhibit?</p> <p>4 MR. BENNETT: Yeah, we probably ought to</p> <p>5 make -- have we marked this -- that training video</p> <p>6 anywhere?</p> <p>7 MR. OSBORNE: No.</p> <p>8 MR. BENNETT: Let's mark it. So that can be</p> <p>9 Berkow 5.</p> <p>10 (Exhibit 5 was marked for identification.)</p> <p>11 I have no further questions.</p> <p>12 MR. OSBORNE: We'll read and sign.</p> <p>13 VIDEOGRAPHER: This concludes the video</p> <p>14 deposition. The time is 12:54 p.m.</p> <p>15 (Discussion held off the record.)</p> <p>16 MR. BENNETT: The only part I want on the</p> <p>17 record is the stipulation that Mr. Osborne and I have</p> <p>18 agreed that you are going to do a transcript of the</p> <p>19 Exhibit 5; we'll mark the transcript Exhibit 6. And</p> <p>20 you can -- you don't need to take the -- the transcript</p> <p>21 needs to be only of the good doctor and his explanation</p> <p>22 of it. It's really the training part.</p> <p>23 MR. OSBORNE: There was another -- there was</p> <p>24 another gentleman's voice on there, too. Just</p> <p>25 whoever --</p> | 177 |

45 (Pages 174 to 177)

Michael Berkow
2/25/2013

| | |
|-----|---|
| 178 | <p>1 STATE OF MINNESOTA) : SS CERTIFICATE 2 COUNTY OF HENNEPIN) 3 I, MICHAEL BERKOW, certify that I have read 4 and examined the typewritten transcript of the 5 deposition, taken of me in the matter of 6 Larry E. Smith, as trustee for the Heirs and Next of 7 Kin of David Cornelius Smith vs. TIMOTHY GORMAN, ET 8 AL., on February 25, 2013, consisting of the preceding 9 pages, and find the same to be true and correct. 10 (Except as follows): 11 Reason Page Line Correction for Change 12 _____ 13 _____ 14 _____ 15 _____ 16 _____ 17 _____ 18 _____ 19 _____ 20 _____ 21 _____ 22 Dated this _____ day of _____ 23 _____ MICHAEL BERKOW 24 25</p> |
| 179 | <p>1 EXAMINATION INDEX 2 By Mr. Bennett: 4-175 3 _____ 4 OBJECTION INDEX 5 By Mr. Osborne: 41, 51, 68, 70, 75, 154, 168, 169 6 By Mr. Bennett: 82 (request to strike) 7 _____ 8 BERKOW EXHIBIT INDEX 9 Exhibit 1: Berkow report (12/17/2012) marked/identified/reviewed 3,4,27,34,40,47,84 10 Exhibit 2: Attachment A, Rule 26(B) Disclosures 11 marked/identified/reviewed 3,4,22 12 Exhibit 3: Attachment B, educational background, training, operational experience and 13 qualifications marked/identified/reviewed 3,4,5,9 14 Exhibit 4: Berkow report (3/15/2012) 15 marked/identified/reviewed 28 16 Exhibit 5: Compact disk labeled "MPD Prone Restraint Training Video" 17 marked/identified/reviewed 175 18 Exhibit 6: Transcript of "MPD Prone Restraint Training Video" 19 marked/identified/reviewed 175 20 INDEX OF PREVIOUSLY MARKED EXHIBITS 21 Exhibit 4: Cause of Death Hierarchy Report reviewed 78 22 Exhibit 30: 23 reviewed 99,125 24 Exhibit 37: 9.15.2010 Statement of Officer Callahan reviewed 41,47,52 25</p> |

46 (Pages 178 to 179)